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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

ALHAMBRA TRUCKING CO., and T. T. CONNOLLY, ET AL., doing business as IPCO TRANSPORTATION COMPANY,
Appellants,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Appellee.*

On Appeal from the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

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v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Appellee.*

On Appeal from the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

The above-captioned appeals from orders of the Supreme Court of California, filed November 13 and December 18, 1963, challenge the validity under the Fourteenth Amendment of a unique and untested state regulatory procedure under which:

1. the California Public Utilities Commission in two separate cases has imposed fines and other penalties

on two small truckers based solely on an unarticulated and expansive interpretation of a vague regulatory provision which has received no judicial definition;

2. the only State court empowered to review the agency's decision has summarily denied review without requiring the administrative record to be brought before it.

Inasmuch as these appeals present the same legal issues, a single Jurisdictional Statement on behalf of both appellants is being filed in accordance with rule 15(3) of this Court.

OPINIONS BELOW

The orders of the Supreme Court of California (Appendix A, *infra*, pp. 1a-2a, 15a-16a) are unreported. The majority and dissenting opinions of the Public Utilities Commission of the State of California are reported at 60 Cal. PUC 537, and 60 Cal. PUC 544, and are reprinted in Appendix A, *infra*, pp. 3a, 17a.

JURISDICTION

On February 5, 1963, the Public Utilities Commission of the State of California (hereinafter Commission) issued separate orders finding that each of these appellants had violated § 3668 of the California Public Utilities Code and imposing various penalties, including fines of $2,000.

Following denials of rehearing by the Commission, separate petitions for review by the Supreme Court of California, both presenting federal constitutional questions under the Fourteenth Amendment, were timely filed by both appellants pursuant to the provisions of California Public Utilities Code § 1756 *et seq.*

On October 16, 1963, the California Supreme Court summarily denied appellant Ipco's review petition. Following a petition for rehearing, again raising federal constitutional questions, an order denying rehearing was filed November 13, 1963. Notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of California on February 10, 1964. On April 2, 1964 and further on June 3, 1964, the Chief Justice of the Supreme Court of California, pursuant to Rule 13(1) of this Court, granted until July 16, 1964, to docket the record herein.

On November 27, 1963 the Supreme Court of California, with two judges dissenting, also summarily denied appellant Alhambra's petition for review. Alhambra's petition for rehearing, again maintaining that its Fourteenth Amendment rights had been infringed, was denied on December 18, 1963. Notice of appeal to the Supreme Court of the United States was filed with the California Supreme Court on March 17, 1964. On April 27, 1964 the Chief Justice of the Supreme Court of California, pursuant to Rule 13(1) of this Court, granted until July 16, 1964, to docket the record herein.

The jurisdiction of this Court is conferred by Title 28 of the United States Code, § 1257(2). Jurisdiction of this Court to review by appeal the judgment of the Supreme Court of California, sustaining the Commission's application of California statutes against timely raised federal constitutional objections, is confirmed by *Atchison, T. & S. F. Ry. Co.* v. *Public Utilities Commission of California*, 346 U.S. 346 (1953).

STATUTORY PROVISIONS INVOLVED

California Public Utilities Code, §§ 3668, 3774, 1756-57, and 1759-60, whose validity as applied is questioned on this appeal, are set out in Appendix B (pp. 28a-31a, *infra*).

QUESTIONS PRESENTED

By summarily denying review without opinion and without considering the administrative record in these two cases, the California Supreme Court upheld § 3668 of the California Public Utilities Code as applied by the Commission, notwithstanding appellants' contentions that the Commission's imposition of fines and penalties on the basis of a vague and undefined "administrative test" which departed from "established judicial doctrine" would deprive them of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

In denying appellants' petitions for rehearing, the California Supreme Court again upheld the Commission's application of § 3668 in the face of appellants' reiterated substantive due process argument supplemented by contentions that approval of the Commission's punitive orders without "an effective judicial review" constituted a denial of procedural due process rights guaranteed by the Fourteenth Amendment to the United States Constitution.

Accordingly, the questions presented are:

(1) whether the Due Process clause of the Fourteenth Amendment is not infringed by a state statute under which an administrative agency has imposed fines and penalties on the basis of an "administrative

test", never judicially defined and so vague and uncertain that men of common intelligence must necessarily guess as to the extent of its prohibition;

(2) whether the Due Process clause of the Fourteenth Amendment is not infringed by a state procedure under which the only court authorized to pass upon an administrative decision imposing fines and penalties can deny review summarily, in the face of federal constitutional questions, without considering the administrative record, without hearing argument, and without any articulation of the reasons or basis for its decisions.

STATEMENT

Both Alhambra Trucking Co., a California corporation, and Ipco Transportation Co., a partnership, are highway permit carriers duly licensed by the Public Utilities Commission of California. Both are subject to the provisions of California Public Utilities Code § 3668, prohibiting transportation of property between points within the State at rates less than the minimum rates established by the California Commission. The minimum rates established by the Commission (Minimum Rate Tariff No. 2) exempt transportation "performed for other carriers" by "independent-contractor subhaulers." Thus, there are no minimum rates established by the California Commission applicable when one carrier utilizes another carrier as a subhauler or subcontractor. On some, but not all, of their shipments, both carriers, in accordance with common practice in California and as permitted by Minimum Rate Tariff No. 2, employed such subhaulers (other carriers acting as subcontractors) and paid them a negotiated rate less than the minimum rates

which would have been applicable except for the carrier-subhauler or contractor-subcontractor relationship.

As shown by information on file with the Commission for some time, a degree of common ownership exists between each carrier and one of its shippers.

Alhambra's application for a city carrier permit, filed September 10, 1958, declared that two of the six directors of Black Diamond Co., a shipper, also served as officers or directors of Alhambra. Three of the thirteen stockholders of Black Diamond hold some stock in Alhambra. Alhambra conferred with representatives of the Commission at least once a year since its formation in 1954, and responded fully to inquiries concerning its relationship with Black Diamond. For seven years the Commission did not question Alhambra's operations under its unrestricted highway contract carrier permit, and in 1958 it issued Alhambra a city carrier permit which similarly contained no restrictions on Alhambra's use of subhaulers.

Ipco's relationship with a shipper, Sequoia Industries, Inc., is limited to ownership of less than 50% of Sequoia's stock by three individuals who are also limited partners of Ipco, holding a total interest in the carrier of approximately 24%. Ipco is managed by two general partners who are also employees of Sequoia but who own none of Sequoia's stock.

The Commission Proceedings

1. *Alhambra.* On or about December 5, 1961, the Commission issued an *ex parte* "Order Instituting Investigation" to determine whether or not Alhambra was complying with certain sections of the Public

Utilities Code, including § 3668. After administrative hearings, a divided Commission (60 Cal. PUC 544) declared that Alhambra constituted a "device" whereby Black Diamond obtained transportation at less than minimum rates in violation of §3668, and ordered Alhambra to cease and desist. In addition, it ordered Alhambra to pay to its subhaulers the difference between the minimum rates and the charges previously paid to the subhaulers on all subhauled Black Diamond shipments since July 1, 1960 (App. A, pp. 9a-12a, infra). This order inflicts a potential liability in excess of $25,000 from Alhambra to the subhaulers.

Finally, utilizing new procedures authorizing it to impose fines on the basis of administratively adjudged violations of the Public Utilities Code (Public Utilities Code § 3774, as amended in 1961), the Commission ordered Alhambra to forfeit its permits for five days, or, in the alternative, to pay a fine of $2,000 (pp. 10a, 12a, *infra*).

The Commission's imposition of these penalties was not and could not have been based on any "known false billing, classification, weight, weighing or report of weight", or any similar "device" forbidden by § 3668. Rather, after reciting the common ownership of Alhambra and Black Diamond, and conceding that Alhambra transports *92% of its business with its own equipment* "and charged and received from Black Diamond Company the full minimum rate for the transportation of property" (p. 6a, *infra*), the Commission majority concluded that the only

> "significant fact is that, to the extent that Alhambra Trucking paid less than the minimum rates for transportation of property in behalf of Black Diamond, Alhambra Trucking thereby reduced

> its expenses and increased its income, which increased income ultimately inures to the benefit of Black Diamond, a majority stockholder interest of which, for the purposes herein, is substantially identical with the majority stockholder interest of Alhambra Trucking. By reason of the foregoing, the Black Diamond Company benefits notwithstanding that Alhambra's profits or surplus remain undistributed." (p. 7a, *infra*).

As the sole authority for this decision, the Commission cited (p. 7a, *infra*) its own ruling in *Soule Transportation, Inc.*, 59 Cal. PUC 261 (Jan. 9, 1962), which had modified the permit of a "carrier" which owned *no* equipment and was a *100% subsidiary* of its *only* shipper on the grounds that "*unity* of ownership, interest, and control" between shipper and carrier made the latter a "device" under § 3668.[1]

Commissioner Mitchell, the senior member of the Commission, dissented from this retroactive penalization of Alhambra. Viewing the 8% of Alhambra's traffic transported by subhaulers as "minimal", in light of its $100,000 a year business derived from several shippers, and finding that Alhambra's operations under its unrestricted permits were in no wise "designed to constitute a device and thus evade Minimum Rate Tariff No. 2", he queried the Commission's punitive application of its "profit formula". Since California had *not* outlawed shipper-carrier affiliations, and since subhauler rates may be negotiated irrespective of the Commission's minimum-rate tariffs, he perceived that its present approach inconsistently penalized carriers such as Alhambra who paid subhaulers less than the minimum rate but permitted any

[1] Unless otherwise indicated, all emphasis is supplied.

shipper operating under a carrier permit to "effect [other] economies [economies] in operation which will redound to its financial advantage." In any event, he concluded that the majority was acting "arbitrarily" in imposing any punitive sanction beyond a future restriction on Alhambra's use of subhaulers. (App. A, pp. 12a-14a, *infra*).

The majority later denied Alhambra's petition for rehearing, which argued in part that the "application of this arbitrary formula of 'common ownership' constitutes a taking of its property without due process of law". (Alhambra Petition for Review, Exhibit C, p. 92).

2. *Ipco.* The proceedings in the *Ipco* case were likewise instituted by the Commission's *ex parte* "Order Instituting Investigation" issued on or about May 22, 1962. The order charged that Ipco was "functioning as an alter ego" of Sequoia. (Ipco Petition for Review, Exhibit A, p. 48). After administrative hearings, the Commission issued an Opinion and Order (60 Cal. PUC 537), virtually identical in all pertinent aspects with the Alhambra order. The opinion recites all instances of common ownership or management between Ipco and Sequoia, but acknowledges that "Ipco charged and received from Sequoia the full minimum rate for the transportation of property" (App. A, pp. 19a-20a, *infra*). Without finding the "alter ego" relationship charged in the complaint, the opinion asserted that the only

> "significant fact is that, to the extent that Ipco paid less than the minimum rates for transportation of property in behalf of Sequoia, Ipco thereby reduced its expenses and increased its income, which increased income ultimately in part inures

to the benefit of Sequoia, of which substantial stockholders are also partners in Ipco." (p. 21a, *infra*).

Relying only on its own *Soule* decision (p. 21a, *infra*), the Commission labeled Ipco a "device" and, as in *Alhambra,* ordered the carrier to cease and desist, to reimburse its subhaulers for transportation since May 1, 1961 (thus inflicting a potential $75,000 liability) and to forfeit its permit for five days, or in the alternative, to pay a fine of $2,000 (pp. 24a-26a, *infra*).

Presentation of Constitutional Issues Below

Under California Public Utilities Code § 1759, the California Supreme Court is the only court empowered to review decisions of the Public Utilities Commission.[2] Its jurisdiction is invoked by a petition for writ of review under § 1756. This section also provides that the writ "shall direct the Commission to certify its record in the case to the court."

In their petitions for review, both Appellants urged that the penalties imposed by the Commission's decision deprived them of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, because based on a vague and unarticulated "administrative test" which was never defined or clarified by any court.[3]

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[2] See also *Pratt* v. *Coast Trucking, Inc.*, 5 Civ. No. 332 (Calif. D.C.A., June 23, 1964) (Commission decision held binding and unreviewable in subhauler's suit to recover "undercharges").

[3] Appellants also pointed out that the Commission's decisions made no "findings on material issues" and thus failed "to accurately state the criteria" on which its decisions were based or "to afford a rational basis for review". (Petitions for Review; Section B; Memoranda of Points and Authorities, Section B).

Both also asserted that they "could not have foreseen the arbitrary action taken by the Commission." (Petitions for Review, Section C; Memoranda of Points and Authorities in Support of Petitions, Section C). In addition, each appellant expressly requested the Court to "exercise its independent judgment on the law and the facts" as required by California Public Utilities Code § 1760 "in any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States." (Alhambra Memorandum of Points and Authorities, p. 46, n. 6; Ipco Memorandum of Points and Authorities, p. 44, n. 6).

Despite these claims that federal constitutional rights were infringed by the Commission's action, the California Supreme Court, without certification of the record, and without hearing oral argument or articulating the reasons or basis for its decision, summarily denied review. In the *Alhambra* case, two justices dissented.

After denial of their review petitions, both appellants petitioned for rehearing, reiterating their contentions that "petitioner is being denied its constitutional right to substantive due process of law". Appellants also contended that the summary denial of review by the *only* state court empowered to review orders of the Public Utilities Commission abridged their Fourteenth Amendment right to "procedural due process of law". (Alhambra Petition for Rehearing, p. 5; Ipco Petition for Rehearing, p. 4).

By its summary denials, the California Supreme Court upheld the Commission's application of § 3668, despite appellants' Fourteenth Amendment conten-

tions. It also applied § 1756 *et seq.* so as to reject appellants' timely contentions that procedural due process required "review" of the Commission's punitive orders to consist of more than a summary denial of review which did not even consider the administrative record. *Atchison, T. & S. F. Ry. Co.* v. *Public Utilities Commission of California*, 346 U. S. 346, 348-9 (1953); cf. *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957).

THE QUESTIONS ARE SUBSTANTIAL

This appeal, involving the actions of the bellwether California Public Utilities Commission, presents issues of crucial importance particularly to small truckers and shippers, whose ability to compete with established large common carriers and integrated carrier-shippers may be impaired by the Commission's vague, uncertain and punitive application of the California Public Utilities Code without effective judicial supervision and control.

Beyond this immediate impact on the important trucking industry in the nation's most populous state, the procedural aspects of this case present far-reaching questions as to the extent to which the Constitution requires meaningful judicial review procedures by state courts of punitive administrative agency action in the face of federal constitutional contentions. This important procedural due process issue raises weighty problems in light of earlier decisions of this Court which have led to confusion among state courts and to disputes among constitutional scholars. Never resolved by this Court, it is now sharply and squarely presented by the newly enacted penal sanctions of the California Public Utilities Code applied in this case.

1. By Sanctioning an Agency's Imposition of Fines and Penalties on the Basis of a Vague and Unarticulated "Administrative Test" Derived from a Judicially Undefined Statute, the California Supreme Court Has Approved the Taking of Appellants' Property in Violation of the Substantive Due Process Guarantees of the Fourteenth Amendment

Fundamental to the concept of due process is the theory that a statute imposing penalties must be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). Indeed, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." (Ibid.). Compare *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 32-36 (1963) (narrowly directed indictment focusing on practice judicially defined and condemned for more than 50 years provides "fairly stable commercial standard" validating application of federal statute).

Moreover, as this Court recently recognized, the "deprivation of the right to fair notice" is even greater where "a statute precise on its face has been unforeseeably and retroactively expanded," punishing the individual for conduct he had "no reason even to suspect" was forbidden. *Bouie* v. *City of Columbia*, 378 U.S. ___, 32 U.S.L. Week 4701, 4702 (June 22, 1964).

Following these principles, this court has invalidated numerous punitive state business regulatory statutes as unconstitutionally vague, even when penal-

ties were applied by a court, rather than an administrative agency.[4]

Unlike analogous federal and state regulatory statutes,[5] the California Public Utilities Code since 1961 has empowered the Commission to impose fines upon highway carriers based *solely* on an *administrative*

[4] *Champlin Ref. Co.* v. *Corporation Comm'n*, 286 U.S. 210 (1932) (statute providing penalties for "waste" in production of oil); *Smith* v. *Cahoon*, 283 U.S. 553 (1931) (statute providing penalties for all types of carriers who operated without licenses); *Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1927) (antitrust law with vague exceptions); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926) (minimum wage statute imposing penalties); *American Seeding Machine Co.* v. *Kentucky*, 236 U.S. 660 (1915) (criminal antitrust statute embodying vague "normal market" standard); *Malone* v. *Kentucky*, 234 U.S. 639 (1914) and *Collins* v. *Kentucky*, 234 U.S. 634 (1914) (statute imposing fines for selling outside tobacco pool); *International Harvester Co. of America* v. *Kentucky*, 234 U.S. 216 (1914) (criminal antitrust statute); Cf. *United States* v. *Cardiff*, 344 U.S. 174 (1952) (self-contradictory federal statute providing penalties for failure to admit factory inspectors); *A. B. Small Co.* v. *American Sugar Ref. Co.*, 267 U.S. 233 (1925) and *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921) (federal statute imposing criminal penalties for "making unreasonable charges"). See also Note, *The Void for Vagueness Doctrine*, 109 U. Pa. L. Rev. 67, 81, 82-3 (1960).

[5] 49 U.S.C. § 16 (2, 8, 9) (Interstate Commerce Act, Railroad Provisions); 49 U.S.C. § 322 (Interstate Commerce Act, Motor Carriers); 49 U.S.C. § 1487 (Federal Aviation Program); 15 U.S.C. § 56 (FTC); 29 U.S.C. App. § 101.14 (NLRB); 47 U.S.C. §§ 11, 504 (FCC); Illinois Revised Statutes 1963, ch. 111⅔, §§ 80-83; McKinney's Consolidated Laws of New York Annotated, Public Service Law § 24; Purdon's Pennsylvania Statutes Annotated, Title 66, ch. 7, §§ 1501, 1502, 1504, 1505; Annotated Laws of Massachusetts, C. 25, § 5, C. 182, §§ 10, 14; General Statutes of Connecticut, Title 16, ch. 277, §§ 16-10, 16-15; Michigan Statutes Annotated, §§ 22-61, 22-65, 22-96, 22-158; Vernon's Annotated Penal Code of the State of Texas, Art. 1690 a. The Public Utilities Commission is the only regulatory commission in the state of California empowered to adjudicate penalties by its own action.

determination. California Public Utilities Code, § 3774, as amended by Stats. 1961, Ch. 1444, § 2.[6] Since 1961, therefore, the Commission's applications of the substantive provisions of California Public Utilities Code § 3668 bring into play the more exacting due process requirements governing the validity of penal statutes. E.g., *Winters* v. *New York*, 333 U.S. 507, 515 (1947).

Measured against these standards, California Public Utilities Code § 3668, as applied here by the Commission, manifestly fails to provide the requisite "fair notice" of the type of conduct which could subject a carrier to fines and penalties.

On its face, § 3668 proscribes several precise situations—i.e., "false billing, classification, weight, weighing or report of weight." Read in context with these specific enumerations, the statutory prohibition against permitting transportation at rates less than minimum rates "by any other device" contains no warning that it could be expanded to *a blanket prohibition of the employment of subhaulers by carriers affiliated in any way with shippers.*

Moreover, no clarifying judicial interpretation by any California court has ever indicated that the statute was intended to penalize such common arrange-

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[6] The Commission's punitive powers were still further increased in 1963 by enactment of Public Utilities Code § 3800, which permits the Commission to impose on any highway permit carrier an *additional* fine equal to the amount of any undercharges "directly or indirectly refunded or remitted in any manner or by any device." Had the Commission exercised this power in the instant cases, the subhaulers could have been liable to fines in excess of $100,000, based on the purported "refunds" they were ordered to recover from Alhambra and Ipco.

ments. Cf. *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 263 (1957) (reversing California Supreme Court order where this Court did not have "the benefit of a definition" by the State court of the statutory standard applied); compare *United States* v. *National Dairy Products Corp.*, 372 U.S. 29 (1963).

Actually, the only § 3668 precedent relied on by the Commission in these cases is its *own* 1962 *Soule* decision (59 Cal. PUC 261). There the Commission found that a carrier which owned no equipment, conducted 43% of its operations through subhaulers, and was a wholly-owned subsidiary of its only shipper which had disregarded the subsidiary's separate corporate existence, was a "device" in violation of § 3668. The Commission imposed no penalty, but merely amended Soule's certificate so as to prohibit the use of subhaulers at less than minimum rates, and the California Supreme Court subsequently denied review. *Soule Transportation, Inc.* v. *California Public Utilities Commission*, Supreme Court No. S. F. 21024, May 29, 1962.[7]

Here, however, the Commission's *Alhambra* decision recited only the previously known interlocking ownership and the fact that in 1960 and 1961 Alhambra, for 8% of its business, used subhaulers who received less than the minimum tariff rates. The Commission noted, but dismissed as "'of no consequence", the fact that "Alahambra Trucking Co. charged and received

[7] Several other recent Commission decisions have adjudged violations of § 3668 based on differing types of affiliation between carriers and shippers. E.g., *Coast Trucking, Inc.*, 59 Cal. PUC 339 (1962); *Heron Mills, Inc.*, 59 Cal. PUC 507 (1962); *J & V Trucking Co.*, 59 Cal. PUC 337 (1962); *Southern California Lumber Transport*, 56 Cal. PUC 553 (1958) review denied, S.F. No. 20076, July 15, 1959.

from Black Diamond Co. the full minimum rate for the transportation of property." (pp. 7a, 6a, *infra*). Instead it theorized that Alhambra's reduced expenses from the use of subhaulers would somehow "inure to the benefit of Black Diamond", so as to mark the otherwise legitimate carrier as an illegal "device" subject to a punitive reparation order and fines. Similarly, the Commission concluded that Ipco's "reduced expenses", of which at most 24% *could* benefit Sequoia *stockholders*, would "inure" in some unspecified way "to the benefit of Sequoia" (p. 21a, *infra*), thus justifying a fine and reparation of 100% of the subhaulers' purported undercharges (pp. 24a, 26a, *infra*).

The vagueness of the Commission's "administrative test" was further highlighted by its answers to Appellants' Petitions for Review. There the Commission's decisions were retrospectively explained by reference to factual material appearing in the administrative hearing transcript which never appeared in the Commission's opinion and was not before the Supreme Court. E.g., Answer to Alhambra Petition, pp. 2-4, 6-7, 15-16; Answer to Ipco Petition, pp. 3-4, 7, 13-15.

Manifestly, as a guide for the future conduct of others who wish to avoid similar penalities, an administrative application of a statute based on such undisclosed factual elements not even recited in the administrative opinion is scarcely adequate to give fair warning of what conduct is actually prohibited and what is permitted.

In short, the Commission would now punish appellants because they could not prophesy in 1960 and 1961 that Section 3668 would be "unforeseeably and retroactively expanded" by administrative construction so as to make illegal conduct which was disclosed to the

Commission and permitted under their certificates and the applicable minimum rate tariff at the time the conduct occurred., E.g., *Bouie* v. *City of Columbia*, 378 U.S. , 32 U.S.L. Week 4701, 4702 (June 22, 1964).

Beyond its punitive and retroactive impact on the appellants, the California Supreme Court's tacit approval of the Commission's vague and unarticulated rationale may create serious economic hardship for California's small truckers and shippers as well as for those in other states whose regulatory commissions follow the lead of California. As ranking Commissioner Mitchell perceived, the Commission's approach "arbitrarily" penalizes carriers who happen to use subhaulers in their operation while leaving untouched the profits of a shipper-carrier which stem from other economies. Since California permits the ownership of carriers by shippers, or the carriage by shippers of their own goods, the Commission's theory paradoxically protects large integrated shipper-carriers to the disadvantage of small carriers, who must employ subhaulers to provide excess capacity at periods of peak demand, and of small shippers who cannot afford to perform all their own transportation.

The retrospective implementation of such arbitrary policies through punitive measures, without judicial definition and control, collides with the Fourteenth Amendment's requirement of fair notice as to what conduct is prohibited and what permitted and creates a substantial federal question requiring settlement by this court. Indeed, the novel punitive powers now accorded the California Public Utilities Commission by Public Utilities Code §§ 3774 and 3800 mark these cases as far more significant than the ordinary utility "confiscation" cases, e.g., *Atchison, T. & S. F. Ry. Co.*

v. *Public Utilities Commission of California*, 346 U.S. 346, 348-9 (1953), to which this Court has accorded plenary review on the merits in the past.

2. The California Supreme Court's Summary Refusal to Review the Commission's Punitive Application of Section 3668 Has Denied Appellants Procedural Due Process, and Raises Substantial and Unresolved Constitutional Questions of Far-Reaching Importance to Administrative Review Procedures of All States

The impermissible vagueness of the Commission's punitive application of § 3668 is compounded by the California Supreme Court's refusal to review the Commission's orders despite appellants' timely assertions of federal constitutional rights. Presenting a classic instance of the *need* for meaningful judicial review, this case illustrates the imperative necessity for clarification by this Court of the extent to which Fourteenth Amendment due process *requires* State courts to review administrative action imposing fines or other punitive sanctions.

The California procedure challenged in this case first permits the same administrative agency to bring charges, adjudicate guilt and impose penalties—without even the minimal safeguard of preliminary findings by an impartial hearing examiner—, and then authorizes the *only* state court which *could* review the agency's action to summarily deny review, without even requiring certification of the administrative record.

Particularly in light of the novel penal provisions of the California Public Utilities Code, this summary denial contrasts sharply with earlier holdings of this Court that the Due Process clause of the Fourteenth Amendment compels a state to provide "a fair oppor-

tunity" for submitting constitutional issues arising from regulatory action "to a judicial tribunal for determination upon its own independent judgment as to both law and facts." *Ohio Valley Water Company* v. *Ben Avon Borough*, 253 U.S. 287, 289 (1920). Cf. *Crowell* v. *Benson*, 285 U.S. 22, 54 (1932) (requiring *de novo* adjudication of "jurisdictional facts" in review of Federal agency action.)[8] Indeed, in the context of state utility regulation, Mr. Justice Frankfurter understood *Ben Avon* to require that "every State must afford judicial review in its courts of a claim under the Due Process Clause," and recognized that State action "in the absence of such judicial review" would be "unconstitutional." *Alabama Public Service Commission* v. *Southern R. Co.*, 341 U.S. 341, 362 (1950) (concurring opinion). Compare *Estep* v. *United States*, 327 U.S. 114, 120 (1946).

To be sure, "judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency." *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 53 (1936). But no decision of this Court suggests that a summary refusal to review confiscatory or punitive agency action, by a state court *which did not even have the record of the administrative proceedings before it*, provides the requisite independent judicial judgment.

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[8] The California Court's refusal to even consider the underlying administrative record likewise obstructs the practice of *this* Court which, in reviewing the decisions of state courts, may wish to reexamine the evidence to ascertain whether it supports a state decision against a claim of federal right. E.g., *Great Northern R. Co.* v. *State of Washington*, 300 U.S. 154, 165 (1936); *Norris* v. *Alabama*, 294 U.S. 587, 589 (1935).

On the other hand, substantial uncertainty as to contemporary constitutional requirements in this context has arisen because of the absence of any authoritative pronouncement by this Court in recent years. In the four decades since this Court's *Ben Avon* decision requiring state courts to exercise "independent judgment" in reviewing agency action, state courts of final instance have been unable to ascertain the current force of this requirement in the very context in which it was announced. Some have held that the federal Constitution, as construed by this Court's *Ben Avon* decision, requires an independent judgment on the law *and* the facts.[9] Conversely, "Many state courts acknowledge that they do not exercise independent judicial judgment on all questions of law and fact" in such cases. 4 DAVIS, ADMINISTRATIVE LAW TREATISE, § 29.09, p. 176 (1958).[10]

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[9] New York: *Staten Island Edison Corp.* v. *Maltbie*, 296 N.Y. 374, 73 N.E. 2d 705 (1947); Massachusetts: *Opinion of the Justices*, 328 Mass. 679, 683, 106 N.E. 2d 259, 262 (1952); Georgia: *Georgia Public Service Commission* v. *Atlanta Gas Light Company*, 205 Ga. 863, 55 S.E. 2d 618 (1949); Indiana: *Public Service Commission* v. *Indianapolis Railways*, 225 Ind. 30, 72 N.E. 2d 434 (1947); Washington: *State ex rel. Pac. Tel. and Tel. Co.* v. *Department of Public Service of Washington*, 19 Wash. 2d 200, 142 P. 2d 498 (1943). For additional cases from Alabama, Oregon, South Dakota, Connecticut, Iowa, Tennessee, Texas, and West Virginia, see 4 DAVIS, ADMINISTRATIVE LAW TREATISE, §§ 29.09, p. 175 nn. 43-46 (1958).

[10] Professor Davis cites cases from 18 states to support this statement. Id. at 176-179, nn. 47-64. In all of these cases, however, the state court at least based its ultimate decision on a review of the administrative record and in some cases reversed the agency by applying the substantial evidence or some other test. See, e.g., *Central Maine Power Co.* v. *Public Utilities Commission*, 150 Me. 257, 109 A. 2d 512 (1954); *Minneapolis Street Ry. Co.* v. *City of Minneapolis*, 251 Minn. 43, 86 N.W. 2d 657 (1957); *In re New Jersey Power & Light Co.*, 9 N.J. 498, 89 A. 2d 26 (1952); *State*

Foremost constitutional scholars likewise cannot fathom the contours of this key aspect of state regulatory law today. On the premise that "the availability of judicial review is a necessary condition, psychologically if not logically, of a system of administrative powers which purports to be legitimate, or legally valid," Professor Jaffe's review of this Court's rulings concludes that in some, but not classifiable, regulatory areas "due process may require judicial process." Jaffe, *The Right to Judicial Review, Pts. I, II*, 71 Harv. L. Rev. 401, 769, 808 (1958). Professor Davis dissents, but notes "that the Supreme Court has managed to leave open nearly all parts of the question" and that "the opinions of the Supreme Court in recent decades are completely devoid of any formulation of principle concerning the constitutional minimum of review." 4 DAVIS, ADMINISTRATIVE LAW TREATISE, §§ 28.18, 28.19, pp. 93, 102, 107, n. 24 (1958).

The California Supreme Court's summary and silent denial of review, in the face of Constitutional contentions, dramatizes the jural void which leaves vital issues to be resolved without a guiding principle by this Court. On its face, California Public Utilities Code § 1760, as amended in 1933, appears to codify this Court's *Ben Avon* decision, by requiring the state Supreme Court in reviewing rulings of the Public Utilities Commission to "exercise an independent

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ex rel Rice v. *Public Service Commission*, 359 Mo. 109, 220 S.W. 2d 61 (1949); *State Corporation Commission* v. *Mountain States Telegraph & Telephone Co.*, 58 N.M. 260, 270 P. 2d 685 (1954); *United Electric Railways Co.* v. *Kennelly*, 80 R.I. 64, 90 A. 2d 775 (1952). Cf. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951) (reversing Court of Appeals affirmance of administrative decision and directing consideration of all the evidence including "whatever in the record fairly detracts from its weight").

judgment on the law and the facts" in "any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States."[11]

But no such "independent judgment" is revealed by the one-line orders entered in these cases. Actually, the necessity for judicial resolution of substantive due process issues through "independent judgment," based on *at least* a review of the record, was underscored by the Commission's answers to appellants' Petitions for Review, which premised the agency's punitive application of § 3668 on additional facts neither cited nor discussed in the Commission's opinions appended to the Review Petitions presented to the Court. (Answer to Alhambra Petition, pp. 2-4, 6-7, 15-16; Answer to Ipco Petition, pp. 3-4, 7, 13-15).

The issues on this appeal thus transcend any academic dispute over the vitality of this Court's *Ben Avon* decision or other Constitutional precedents, or the precise content of reviewing tests such as "independent judicial judgment" or "substantial evidence". Rather, if penalties imposed by retrospective administrative action based on vague and judicially uninterpreted statutes may be sanctioned by a summary denial of all review by a state court, which does not even have the administrative record before it, no mean-

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[11] The Commission's answer to Ipco's Petition for Writ of Review ignored § 1760, and flatly asserted that "review is not authorized," citing California Public Utilities Code § 1757 to the effect that the "findings and conclusion of the Commission on questions of fact shall be final and shall not be subject to review except as provided in this article." Answer to Petition for Writ of Review, pp. 11-1 See also Answer to Alhambra Petition, p. 13.

ingful judicial review *is* required by the Constitution in the state regulatory field.

As this Court has recognized, administrative agencies frequently "work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient." Thus, the prospect of *unchecked administrative action* which "would place constitutional rights of liberty and property" at the "mercy of administrative officials" is "not one to be lightly regarded." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 52 (1936). See also Jaffe, *The Right to Judicial Review*, 71 Harv. L. Rev. 401 (1958); cf. Friendly, *A Look at the Federal Administrative Agencies*, 60 Columbia L. Rev. 429 (1960); Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 Yale L. J. 931 (1960); Berger, *Removal of Judicial Functions from Federal Trade Commission to a Trade Court: A Reply to Mr. Kintner*, 59 Mich. L. Rev. 199 (1960).

Recognition of a Constitutionally required minimum of judicial review, whereby "any initial exercise of power should be subject to check by an independent authority," can only contribute to the increased integrity of the administrative process. See 4 DAVIS, ADMINISTRATIVE LAW TREATISE, § 28.21 pp. 112-113 (1958). And particularly in the context of administratively imposed penalties, some pronouncement by this Court defining the minimal guarantees of procedural due process for judicial review of state administrative action[12] is now imperative to protect Federal Constitutional rights.

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[12] Such a statement might modify *Ben Avon* to take account of Federal experience under the "substantial evidence" rule. See *Universal Camera Corp. v. NLRB*, 340 U.S. 471 (1951). Cf. 4 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 28.19, 28.07, pp. 120, 31 (1958).

Whether the Due Process Clause of the Fourteenth Amendment tolerates punitive agency action unchecked by meaningful judicial review is a substantial issue deserving review by this Court.

CONCLUSION

In this case the elements of statutory vagueness, punitive agency action, and abdication of judicial reviewing authority unite to create novel Due Process issues of far-reaching significance.

Leaving the California regulatory commission as "a law unto itself",[13] the California Supreme Court has sanctioned a retrospective and punitive administrative application of a regulatory statute, which exposes small truckers to harsh penalties without warning or guides, other than the Commission's fiat on a day-to-day basis by decisions which disclose no meaningful standard. This vindictive operation of the law is magnified by the California court's refusal to control or check the Commission's arbitrary exercise of administrative power.

For the reasons detailed in this Statement, appellants submit that the California Supreme Court's judgments pose federal questions of national importance

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[13] Committee on Administrative Agencies and Tribunals, *Review of Decisions and Orders of the Public Utilities Commission*, 33 Cal. St. B.J. 421, 422 (1958).

which warrant plenary review and resolution by this Court.

Respectfully submitted,

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July 16, 1964

APPENDIX A

The unreported orders of the Supreme Court of California denying Appellants' petitions for Writ of Review, the orders denying rehearing and the Opinions and Orders of the California Public Utilities Commission, reported at 60 Cal. PUC 537, 544, are as follows:

Filed November 27, 1963

William I. Sullivan, Clerk
By JWR, S. F. Deputy

Order Denying Writ of Review

S. F. No. 21440

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

ALHAMBRA TRUCKING COMPANY

v.

PUBLIC UTILITIES COMMISSION

Petition for writ of review DENIED.

SCHAUER, J. and McCOMB, J. are of the opinion that the petition should be granted.

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of: order
as shown by the records of my office.

Witness my hand and the seal of the Court this 5th day of June, 1964.

WILLIAM I. SULLIVAN, *Clerk*

By: CRABTREE, *Deputy*
GIBSON, *Chief Justice*

Filed December 18, 1963

William I. Sullivan, Clerk
By JWR

Order Due December 27, 1963

Order Denying Rehearing

S. F. No. 21440

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

ALHAMBRA TRUCKING COMPANY

v.

PUBLIC UTILITIES COMMISSION

Petition for rehearing DENIED.

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of: order
as shown by the records of my office.

Witness my hand and the seal of the Court this 5th day of June, 1964.

WILLIAM I. SULLIVAN, *Clerk*

By: CRABTREE, *Deputy*
GIBSON, *Chief Justice*

Before the Public Utilities Commission of the State of California

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Decision No. 64905

Case No. 7243

Investigation on the Commission's own Motion into the operations, rates and practices of Alhambra Trucking Co.; Trucking Unlimited; and J. A. Stafford Trucking, California corporations.

Berol, Loughran & Geernaert by *Bruce R. Geernaert*, for Alhambra Trucking Co.; *Harold Thurman*, for Trucking Unlimited; and *Donald Murchison*, for J. A. Stafford Trucking, respondents.

Elinore Charles and *Frank O'Leary*, for the Commission staff.

Opinion

On December 5, 1961, the Commission issued its order instituting investigation into the operations, rates and practices of Alhambra Trucking Co. By amended order Trucking Unlimited and J. A. Stafford Trucking were named as respondents. The purpose of the order is to determine whether Alhambra Trucking Co. as a highway permit carrier has violated Section 3668 of the Public Utilities Code by assisting, suffering and permitting a shipper to obtain transportation of its property between points within this State at rates less than those established

by the Commission in Minimum Rate Tariff No. 2 and whether respondents have violated Sections 3664 and 3737 of the Public Utilities Code by charging, demanding and receiving a lesser compensation for the transportation of property than the applicable charges prescribed in Minimum Rate Tariff No. 2 and supplements thereto.

Pursuant to the order of investigation a public hearing was held at Sacramento before Examiner Martin J. Porter on April 24, 1962. Briefs have been filed and the matter is now ready for decision.

There are two issues in this case, one being incorrect billing by the carrier which resulted in undercharges, and the other being whether Alhambra Trucking Co. (a permit carrier) and Black Diamond Company (a shipper) are so united in interest, management and ownership as to make the use by Alhambra Trucking Co. of purported subhaulers, who receive less than the minimum rate for the transportation of property of the Black Diamond Company, a device by which the Black Diamond Company obtains transportation of its property at rates less than those established by the Commission in Minimum Rate Tariff No. 2.

The staff selected a review period of July 1, 1960, through January 31, 1961, and through a rate expert witness established that undercharges had occurred as follows:

Freight Bill No.	Date	Charge Assessed or Collected by Alhambra Trucking Co.	Charge Correct	Undercharge
1761	8/ 5/60	$256.82	$285.36	$ 28.54
1869	9/ 1/60	642.16	648.16	6.00
1929	9/14/60	468.50	627.79	159.29
2229	12/ 7/60	388.52	511.70	124.18
2306	12/22/60	240.95	258.80	17.85
2412	1/20/61	288.06	303.60	15.54
2398	1/25/61	378.68	554.16	175.48
2402	1/25/61	251.75	279.72	27.97
2427	1/28/61	256.39	284.88	28.49
2265	12/8, 9/60	474.63	672.46	197.83
2283	12/21/60	268.38	298.20	29.82
2284	12/21, 22/60	385.28	501.28	116.00

Undercharges for these shipments amounted to $926.99.

The following are shareholders of Alhambra Trucking Co., a permit carrier:

Name	No. of Shares
M. B. Kibbey	2,420
Henry Teichert	150
Robert D. Hemenway	297
Jack Reynolds	34
B. Epler	99

The following are shareholders of the Black Diamond Company, a corporation conducting a lumber business:

Name	No. of Shares
M. B. Kibbey	32,250
N. S. Lauppe	1,250
Robert B. Miller	1,250
Henry Teichert	5,097
Nancy T. Kibbey	6,000
Robert D. Hemenway	750
Jack C. Herney	154
T. H. Richards, Jr.	500
Joan K. Taylor	100
B. J. Siebenthal, M.D.	500
Patrick D. McIntosh	100
James McClatchy	1,000
P. E. Bradford	250

M. B. Kibbey is president of both Alhambra Trucking Co. and Black Diamond Company. Two of Alhambra's three-man board of directors are also directors of Black Diamond, and Mrs. Nancy Kibbey (wife of M. B. Kibbey) is vice president of Black Diamond and on its board of directors. Robert D. Hemenway is treasurer and office

manager of Alhambra Trucking Co. and treasurer of Black Diamond Company. Henry Teichert is secretary of both companies.

It appears from the record that M. B. Kibbey, Henry Teichert and Robert D. Hemenway, officers of both Alhambra Trucking Co. and Black Diamond Company, own approximately 95 percent of the stock of the trucking company and that they and M. B. Kibbey's wife own approximately 90 percent of the stock of the Black Diamond Company.

Alhambra Trucking Co. transports 92 percent of its business with its own equipment and uses subhaulers for the remaining 8 percent. The subhaulers so employed were Trucking Unlimited and J. A. Stafford Trucking.

Alhambra Trucking Co. charged and received from Black Diamond Company the full minimum rate for the transportation of property (except in the instances of undercharges as hereinbefore specified) and paid the subhaulers an amount less than the minimum rate.

It was stipulated that Alhambra Trucking Co. holds Highway Contract Carrier Permit No. 34,3353 and City Carrier Permit No. 34-3632 and J. A. Stafford Trucking holds Radial Highway Common Carrier Permit No. 19-23198 and Highway Contract Carrier Permit No. 19-49273 and that they have been served with Minimum Rate Tariff No. 2, Distance Table No. 4 and applicable supplements thereto.

The Commission records show that Trucking Unlimited holds Radial Highway Common Carrier Permit No. 19-18009 and Highway Contract Carrier Permit No. 19-18010 and a certificate of public convenience and necessity as a highway common carrier, and has been served with Minimum Rate Tariff No. 2, Distance Table No. 4 and applicable supplements thereto.

Discussion

The facts here are sufficiently similar to the facts in Soule[1] to warrant reaching the same result. The interlocking of ownership, management and control between Black Diamond and Alhambra Trucking is sufficiently complete to justify concluding that the common stockholders of each corporation stand in a position ultimately to receive the benefit of the reduced rate transportation effected through subhaulers. As we said in Soule, it is not necessary to find that moneys were actually remitted to the ostensible shipper, either in the form of payments representing the difference between amounts paid to the ostensible prime carrier and what the carrier paid to the subhaulers or in the form of dividends, distribution of capital on dissolution, or otherwise. Thus, the fact that Black Diamond at all times paid the lawful minimum rates to Alhambra Trucking is of no consequence. The significant fact is that, to the extent that Alhambra Trucking paid less than the minimum rates for transportation of property in behalf of Black Diamond, Alhambra Trucking thereby reduced its expenses and increased its income, which increased income ultimately inures to the benefit of Black Diamond, the majority stockholder interest of which, for the purposes herein, is substantially identical with the majority stockholder interest of Alhambra Trucking. By reason of the foregoing, the Black Diamond Company benefits notwithstanding that Alhambra's profits or surplus remain undistributed.

Based upon a consideration of the evidence and arguments herein, the Commission finds that there exists such a unity of ownership, management and control between Black Diamond Company as shipper and respondent Alhambra Trucking Co. as a highway permit carrier as to warrant disregard of Alhambra Trucking Co. as a separate corporate

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[1] Investigation on the Commission's own motion into the operations, rates and practices of Soule Transportation, Inc., a corporation—Case No. 7105, Decision No. 63103, dated January 9, 1962. Petition for Writ of Review denied May 29, 1962.

entity for the purpose of enforcing the minimum rates prescribed by Minimum Rate Tariff No. 2. The subhaulers were in fact prime carriers who received less than the minimum rates established by the Commission in Minimum Rate Tariff No. 2, and the extent to which the subhaulers received less than the minimum rates is the measure of the benefit which the shipper, in this case Black Diamond Company, received.

Based upon the evidence we hereby find that:

1. Alhambra Trucking Co., J. A. Stafford Trucking and Trucking Unlimited are engaged in the transportation of property over the public highways for compensation; Alhambra Trucking Co. as a highway contract carrier under Permit No. 34-3353 and as a city carrier under Permit No. 34-3632; J. A. Stafford Trucking as a radial highway common carrier under Permit No. 19-23198 and as a highway contract carrier under Permit No. 19-49273; Trucking Unlimited as a radial highway common carrier under Permit No. 19-18009, as a highway contract carrier under Permit No. 19-18010 and as a highway common carrier pursuant to a certificate of public convenience and necessity.

2. Respondent Alhambra Trucking Co. assessed and collected charges less than the applicable charges established by this Commission in Minimum Rate Tariff No. 2, which resulted in undercharges as follows:

Freight Bill No.	Date	Charge Assessed or Collected by Alhambra Trucking Co.	Correct Charge	Undercharge
1761	8/ 5/60	$256.82	$285.36	$ 28.54
1869	9/ 1/60	642.16	648.16	6.00
1929	9/14/60	468.50	627.79	159.29
2229	12/ 7/60	388.52	511.70	124.18
2306	12/22/60	240.95	258.80	17.85
2412	1/20/61	288.06	303.60	15.54
2398	1/25/61	378.68	554.16	175.48
2402	1/25/61	251.75	279.72	27.97
2427	1/28/61	256.39	284.88	28.49
2265	12/8, 9/60	474.63	672.46	197.83
2283	12/21/60	268.38	298.20	29.82
2284	12/21, 22/60	385.28	501.28	116.00

Undercharges for these shipments amounted to $926.99.

3. During the period of August 5, 1960 through January 28, 1961, respondent Alhambra Trucking Co. engaged other highway permit carriers as subhaulers to transport property of Black Diamond Company within this State, to whom respondent paid less than the minimum rates prescribed by Minimum Rate Tariff No. 2 in respects and amounts as follows:

Freight Bill No.	Date	Difference Between Correct Charge and Amount Paid Subhauler	Name of Subhauler
1761	8/ 5/60	$125.36	Trucking Unlimited
1869	9/ 1/60	168.16	Trucking Unlimited
1929	9/14/60	307.79	Trucking Unlimited
2229	12/ 7/60	191.70	Trucking Unlimited
2306	12/22/60	98.80	Trucking Unlimited
2412	1/20/61	103.60	Trucking Unlimited
2398	1/25/61	234.16	Trucking Unlimited
2402	1/25/61	119.72	Trucking Unlimited
2427	1/28/61	124.88	Trucking Unlimited
2265	12/8, 9/60	252.46	J. A. Stafford Trucking
2283	12/21/60	158.20	J. A. Stafford Trucking
2284	12/21, 22/60	221.28	J. A. Stafford Trucking and Trucking Unlimited

4. There exists such a unity of ownership, interest and control between Black Diamond Company as shipper and respondent Alhambra Trucking Co. as a highway permit carrier as to make such an intercorporate arrangement a device by means of which Section 3668 of the Public Utilities Code was violated.

5. Trucking Unlimited and J. A. Stafford Trucking were in fact prime carriers who received less than the minimum rates established by the Commission in Minimum Rate Tariff No. 2.

6. Alhambra Trucking Co. should review its records relating to all transportation performed in behalf of Black Diamond Company wherein Alhambra Trucking Co. employed other carriers to effect such transportation between July 1, 1960, and the effective date of this order, and should

pay to such other carriers the difference between the lawful minimum rates and charges applicable to such transportation and the amount previously paid to such other carriers.

7. Trucking Unlimited and J. A. Stafford Trucking should review their records relating to all transportation wherein they were engaged by Alhambra Trucking Co. to transport property in behalf of Black Diamond Company between July 1, 1960, and the effective date of this order for the purpose of ascertaining the lawful minimum rates for such transportation, and should take such action, including legal action, as may be necessary to collect the differences between the lawful minimum rates and the amounts they received for such transportation.

8. Alhambra Trucking Co.'s permits should be suspended for a period of five consecutive days, or, in the alternative, it should be required to pay a fine of $2,000.

ORDER

IT IS ORDERED that:

1. Alhambra Trucking Co. cease and desist from permitting Black Diamond Company to obtain transportation of property between points in this State at rates less than the minimum rates established by the Commission.

2. If, on or before the twentieth day after the effective date of this order, respondent Alhambra Trucking Co. has not paid the fine referred to in paragraph 9 of this order, then Highway Contract Carrier Permit No. 34-3353 and City Carrier Permit No. 34-3632 issued to Alhambra Trucking Co. shall be suspended for five consecutive days starting at 12:01 a.m., on the second Monday following the twentieth day after said effective date. Respondent shall not, by leasing the equipment or other facilities used in operations under these permits for the period of suspension, or by any other device, directly or indirectly allow such equipment or facilities to be used to circumvent the suspension.

3. Respondent shall post at its terminal and station facilities used for receiving property from the public for

transportation, not less than five days prior to the beginning of the suspension period, a notice to the public stating that its highway contract carrier permit and city carrier permit have been suspended by the Commission for a period of five days. Within five days after such posting respondent shall file with the Commission a copy of such notice, together with an affidavit setting forth the date and place of posting thereof.

4. Alhambra Trucking Co. shall review its records relating to all transportation performed in behalf of Black Diamond Company wherein Alhambra Trucking Co. employed other carriers to effect such transportation between July 1, 1960, and the effective date of this order, and shall pay to such other carriers the difference between the lawful minimum rates and charges applicable to such transportation and the amount previously paid to such other carriers.

5. Trucking Unlimited and J. A. Stafford Trucking shall review their records relating to all transportation wherein they were engaged by Alhambra Trucking Co. to transport property in behalf of Black Diamond Company between July 1, 1960, and the effective date of this order for the purpose of ascertaining the lawful minimum rates for such transportation, and shall take such action, including legal action, as may be necessary to collect the difference between the lawful minimum rates and the amounts they received for such transportation.

6. Within ninety days after the effective date of this decision, Alhambra Trucking Co., Trucking Unlimited and J. A. Stafford Trucking shall file with the Commission a report setting forth the lawful minimum rates for the transportation and the amount paid Trucking Unlimited and J. A. Stafford Trucking found after examination required by paragraphs 4 and 5 hereof.

7. In the event charges to be collected as provided by paragraph 5 of this order, or any part thereof, remain uncollected one hundred and twenty days after the effective

date of this order, Trucking Unlimited and J. A. Stafford Trucking shall institute legal proceedings to effect collection and shall submit to the Commission on the first Monday of each month a report of the undercharges remaining to be collected and specifying the action taken to collect such charges and the result of such until such charges have been collected in full or until further order of this Commission.

8. On the effective date of this decision the Secretary of this Commission is directed to cause to be amended Highway Contract Carrier Permit No. 34-3353 issued to Alhambra Trucking Co., by prohibiting said Alhambra Trucking Co., whenever it engages other carriers in connection with the transportation of property for Black Diamond Company or of its customers and suppliers, from paying such other carriers less than the applicable minimum rates established by the Commission.

9. As an alternative to the suspension of operating rights imposed by paragraph 2 of this order, Alhambra Trucking Co. may pay a fine of $2,000 to this Commission on or before the twentieth day after the effective date of this order.

The Secretary of the Commission is directed to cause personal service of this order to be made upon Alhambra Trucking Co., Trucking Unlimited and J. A. Stafford Trucking, and this order shall become effective twenty days after the date of such service upon the respondents.

Dated at San Francisco, California, this 5th day of February, 1963.

George G. Grover
President
Everett C. McKeage
Frederick B. Holoboff
Commissioners

(Seal) Certified as a True Copy
R. J. Pajalich
Secretary, Public Utilities Commission,
State of California.

I concur in part and dissent in part.

The Commission, *now*, in issuing operating permits and in reviewing permits issued in the past, where it appears that there is an affiliation between carrier and shipper by reason of common ownership, management, or control has specified in such permits, for the future, that not less than the applicable minimum rates shall be paid by such carrier to subhaulers engaged to carry the property of the affiliated shipper.[1]

The problem presented to the Commission, herein, is what action shall be taken against a carrier possessing an unrestricted permit and found to be affiliated with a shipper, where in the past less than the applicable minimum rate has been paid by the carrier to a subhauler engaged in carrying the property of the affiliated shipper? Shall we order the carrier to reimburse the subhaulers arbitrarily? This appears to be the present practice (as in the instant decision). Or rather, should we not examine the operations of the respondent carriers and reach a conclusion based on a study of their own individual practices? I would suggest that the latter course is the most logical and the most equitable. And it then follows—after an examination of the record in this case, that no action other than a future restriction of Alhambra's permit is warranted because of its shipper-carrier relationship.

Alhambra transports 92 percent of its carrier business by its own equipment and a minimal amount, 8 percent by subhaulers. There was no evidence that Alhambra by any method passed on to Black Diamond any part of the difference between the rates paid by Alhambra to subhaulers and the lawful minimum rate. Any benefit which Black Diamond received is essentially the same benefit that occurs in every shipper-carrier alter ego. A shipper that operates under a carrier permit can effect economies in operation which will redound to its financial advantage, even though it engages subhaulers and pays the subhaulers the minimum

[1] Decision No. 63227, Case No. 6567; Decision No. 63515, Case No. 6541.

rate. If a shipper pays his alter ego carrier $100,000 a year in minimum rates for transportation and the carrier declares a profit of $5,000 a year, does not the shipper profit similarly as the shipper-carrier who employs a subhauler at less than the minimum rate? Therefore, if we attempt to apply a profit formula as the sole criterion of the carrier's actions, we should be consistent in its application. I do not think we should be so exclusive.

Alhambra is a carrier that reports a gross operating revenue of over $100,000 a year. It employs its own trucks and drivers. If the carrier were of a mind to circumvent Section 3668 and evade minimum rates illegally, would it not employ subhaulers on a 100 percent basis and reap a greater financial harvest than employ subhaulers for only 8 percent of its traffic with the same attendant risk of discovery and for a lesser return?

I cannot conclude from the evidence submitted that the carrier was transporting property in a manner designed to constitute a device and thus evade Minimum Rate Tariff No. 2.

/s/ PETER E. MITCHELL
Peter E. Mitchell
Commissioner

Filed October 16, 1963

William I. Sullivan, Clerk
By Crabtree, S. F. Deputy

Order Denying Writ of Review

S. F. No. 21334

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

CONNOLLY et al.

v.

PUBLIC UTILITIES COMMISSION, etc., et al.

Petition for writ of review DENIED.

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of order as shown by the records of my office.

Witness my hand and the seal of the Court this 8th day of June, 1964.

WILLIAM I. SULLIVAN, *Clerk*

By: CRABTREE, *Deputy*

GIBSON, *Chief Justice*

Filed November 13, 1963

William I. Sullivan, Clerk
By JWR, S. F. Deputy

Order Due November 15, 1963

Order Denying Rehearing

S. F. No. 21334

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

CONNOLLY et al.

v.

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA

Petition for rehearing DENIED.

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of order as shown by the records of my office.

Witness my hand and the seal of the Court this 8th day of June, 1964.

WILLIAM I. SULLIVAN, *Clerk*

By: CRABTREE, *Deputy*
GIBSON, *Chief Justice*

Decision No. 64901

Before the Public Utilities Commission
of the State of California

Investigation on the Commission's own Motion into the relationships, operations, rates and practices of T. T. CONNOLLY and W. A. COKE, general partners, and F. L. ARNDT, G. V. BOSCARIOL, VERA BEALE, G. B. POTTER, B. H. DENNIS, PETITE LUELLWITZ, D. C. MCLEAN, H. P. HEPPNER, NICK KOVACEVICH, VICTOR JOHNSON, M. V. MCMILLAN, E. P. IVORY, GEORGE HARRES and H. M. IVORY, limited partners, copartners doing business as IPCO TRANSPORTATION COMPANY, SEQUOIA FOREST INDUSTRIES, INC., a California corporation; and RONALD O. DOOMS, BERNHARD R. DOERKSEN, and RALPH D. JENNER.	Case No. 7359 (Filed May 22, 1962)

William H. Kessler, appearing for all respondents, except Ralph D. Jenner.

Hugh N. Orr, for the Commission staff.

Opinion

On May 22, 1962, the Commission issued its order instituting investigation into the operations, rates and practices of T. T. Connolly and W. A. Coke, general partners, and F. L. Arndt, G. V. Boscariol, Vera Beale, G. B. Potter,

B. H. Dennis, Petite Luellwitz, D. C. McLean, H. P. Heppner, Nick Kovacevich, Victor Johnson, M. V. McMillan, E. P. Ivory, George Barres and H. M. Ivory, limited partners, doing business as IPCO Transportation Company, hereinafter referred to collectively as respondent IPCO, for the purpose of determining (1) whether respondent IPCO has violated Sections 3664 or 3667 of the Public Utilities Code by charging, demanding or receiving a lesser compensation for the transportation of property over the public highways than the applicable charges prescribed in Minimum Rate Tariff No. 2; (2) whether respondent IPCO is an alter ego of respondent Sequoia Forest Industries, Inc., employed as a device by which Sequoia Forest Industries Inc., may be obtaining transportation of property between points within the State of California at rates less than the minimum rates prescribed by Minimum Rate Tariff No. 2 in violation of Section 3668 of the Public Utilities Code; (3) whether through common ownership, management or control of respondent IPCO and its authorization to operate as a radial highway common carrier and by the use of "subhaulers" employed by said IPCO, Sequoia Forest Industries, Inc., hereinafter referred to as Sequoia, has sought to obtain or has obtained transportation of its property at less than the minimum rates or charges prescribed by the Commission in violation of Section 3669 of the Public Utilities Code; (4) whether respondents Ronald O. Dooms, Bernhard R. Doerksen and Ralph D. Jenner, or any of them, as highway permit carriers, have charged, demanded, collected, received or accepted for the transportation of property or for any service in connection therewith, purportedly performed as a subhauler for IPCO, rates or charges less than the minimum rates and charges applicable to such transportation which have been established by the Commission in violation of Section 3667 of the Public Utilities Code.

Pursuant to the order of investigation a public hearing was held at Fresno before Examiner Martin J. Porter on

July 26 and 27, 1962, and on the latter date the matter was submitted.

IPCO consists of two general partners, W. A. Coke and T. T. Connolly, and fourteen limited partners. The stock of Sequoia is owned by Gus Luellwitz, Petite Luellwitz, Vera Beale and Grant Potter.

The commission staff presented evidence that an examination of IPCO records and method of operation for the month of June 1961, showed that practically all of the transportation performed by IPCO was for Sequoia or one of its subsidiaries, and that IPCO employs subhaulers who perform the actual transportation.

The evidence also shows that W. A. Coke and T. T. Connolly manage and supervise all the operations of IPCO and both hold responsible positions with Sequoia. T. T. Connolly is treasurer and chief accountant of Sequoia and W. A. Coke is shipping foreman of Sequoia. Petite Luellwitz is a limited partner of IPCO and owns, together with her husband Gus Luellwitz, approximately 95% of the stock of Sequoia. G. B. Potter is a limited partner of IPCO and a stockholder, vice president and general manager of Sequoia. F. L. Arndt is a limited partner of IPCO and is the secretary of Sequoia. B. H. Dennis is a limited partner of IPCO and is the sales manager of Sequoia. Vera Beale is a limited partner of IPCO and is a stockholder of Sequoia. IPCO and Sequoia share common headquarters and employees of Sequoia perform services for IPCO. Sequoia bills IPCO for the services of such employees and for telephone, postage, office space and supplies. Almost all of the transportation performed by IPCO is for Sequoia or one of its subsidiaries.

The staff selected a review period of June 1961 and through a rate expert witness established that undercharges had occurred as follows:

Freight Bill No.	Date	Charge Assessed Or Collected By Respondent	Correct Charge	Undercharge
08332	6/ 5/61	$ 131.85	$ 204.80	$ 72.95
08333	6/ 5/61	161.21	232.86	71.65
08335	6/ 5/61	151.54	168.39	16.85
08336	6/ 5/61	93.81	120.60	26.79
08340	6/ 6/61	133.33	208.42	75.09
08366	6/ 9/61	102.00	216.00	114.00
08367	6/ 9/61	102.00	160.00	58.00
08369	6/ 9/61	344.41	370.37	25.96
08350	6/ 7/61	13.22	17.80	4.58
08428	6/1-15/61	2,979.89	3,406.30	426.41
08419	6/16/61	37.40	41.84	4.44

Undercharges for these shipments amounted to $896.72

The rate witness testified that the main cause of the undercharges was failure to have written instruction from the shipper authorizing split delivery and using the wrong classification rating for the commodity as shown on the document.

The respondent's evidence relating to such undercharges was to the effect that it was the shipper's intent that these shipments be split deliveries and the commodity classification set forth on the documents was in error; that in fact the product shipped was one that would take the lower rate and therefore there would be no undercharges as to these shipments.

With respect to transportation in behalf of Sequoia where subhaulers were used, IPCO charged and received from Sequoia the full minimum rate for the transportation of property (except in the instance of undercharges hereinbefore referred to) and paid subhaulers less than the minimum rate.

It was stipulated that IPCO holds Radial Highway Common Carrier Permit No. 54-3795 and has been served with Minimum Rate Tariff No. 2, Distance Table No. 4 and applicable supplements thereto, and that respondents Ronald O. Dooms and Bernhard R. Doerksen are operating

under permitted authority; that Ronald O. Dooms has been served with Minimum Rate Tariff No. 2 and Distance Table No. 4 and Bernhard R. Doerksen has been served with Minimum Rate Tariff No. 8 and Distance Table No. 4. The evidence shows that respondent Ralph D. Jenner holds Radial Highway Common Carrier Permit No. 10-3949 and was served with Minimum Rate Tariff No. 2 and Distance Table No. 4.

Discussion

The facts here are sufficiently similar to the facts in Soule [1] to warrant reaching the same result. The interlocking of ownership, management and control between IPCO and Sequoia is sufficiently complete to justify concluding that the partners of IPCO and the stockholders of Sequoia stand in a position ultimately to receive the benefit of the reduced rate transportation effected through subhaulers. As we said in Soule, it is not necessary to find that moneys were actually remitted to the ostensible shipper, either in the form of payments representing the difference between amounts paid to the ostensible prime carrier and what the carrier paid to the subhauler or in the form of dividends, distribution of capital on dissolution, or otherwise. Thus, the fact that Sequoia at all times paid the lawful minimum rates to IPCO is of no consequence. The significant fact is that, to the extent that IPCO paid less than the minimum rates for transportation of property in behalf of Sequoia, IPCO thereby reduced its expenses and increased its income, which increased income ultimately in part inures to the benefit of Sequoia, of which substantial stockholders are also partners in IPCO.

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[1] Investigation on the Commission's own motion into the operations, rates and practices of Soule Transportation, Inc., a corporation—Case No. 7105, Decision No. 63103, dated January 9, 1962. Petition for Writ of Review denied May 29, 1962.

Based upon a consideration of the evidence and arguments herein, the Commission finds that there exists such a unity of ownership, management and control between Sequoia as shipper and IPCO as a highway permit carrier as to make such an arrangement a device by means of which Section 3668 of the Public Utilities Code was violated. The subhaulers were in fact prime carriers who received less than the minimum rates established by the Commission in Minimum Rate Tariff No. 2, and the extent to which the subhaulers received less than the minimum rates is the measure of the benefit which the shipper, in this case Sequoia, received.

Based upon the evidence we hereby find that:

1. IPCO Transportation Company, a partnership, Ronald O. Dooms, Bernhard R. Doerksen and Ralph D. Jenner hold permits authorizing them to transport property over the public highways for compensation.

2. Respondent IPCO assessed and collected charges less than the applicable charges established by this Commission in Minimum Rate Tariff No. 2, which resulted in undercharges as follows:

Freight Bill No.	Date	Charge Assessed Or Collected By Respondent	Correct Charge	Undercharge
08332	6/ 5/61	$ 131.85	$ 204.80	$ 72.95
08333	6/ 5/61	161.21	232.86	71.65
08335	6/ 5/61	151.54	168.39	16.85
08336	6/ 5/61	93.81	120.60	26.79
08340	6/ 6/61	133.33	208.42	75.09
08366	6/ 9/61	102.00	216.00	114.00
08367	6/ 9/61	102.00	160.00	58.00
08369	6/ 9/61	344.41	370.37	25.96
08350	6/ 7/61	13.22	17.80	4.58
08428	6/1-15/61	2,979.89	3,406.30	426.41
08419	6/16/61	37.40	41.84	4.44
			Undercharges for these shipments amounted to	$ 896.72

3. During the months of May and June 1961, respondent IPCO engaged other highway permit carriers as subhaulers to transport property of Sequoia within this State, to whom respondent paid less than the minimum rates prescribed by Minimum Rate Tariff No. 2 in respects and amounts as follows:

Freight Bill No.	Date	Difference between correct charge and amount paid subhauler	Name of Subhauler
08332	6/ 5/61	$ 92.10	R. O. Dooms Trucking
08333	6/ 5/61	84.55	"
08335	6/ 5/61	88.02	"
08336	6/ 5/61	34.29	"
08340	6/ 6/61	71.80	"
08341	6/ 6/61	14.46	"
08352	6/ 8/61	13.40	"
08356	6/ 8/61	116.50	"
08361	6/ 9/61	17.60	"
08362	6/ 9/61	17.60	"
08366	6/ 9/61	124.00	"
08367	6/ 9/61	68.00	"
08369	6/ 9/61	57.57	"
08373	6/10/61	12.14	"
08238	5/19/61	20.10	Doerksen Bldg. Material
08239	5/19/61	32.51	"
08316	6/ 1/61	15.46	"
08350	6/ 7/61	13.15	"
08348	6/ 7/61	18.27	"
08349	6/ 7/61	1.38	"
08358	6/ 8/61	21.56	"
08428	6/1-15/61	2,120.93	R. D. Jenner
8392	6/13/61	17.79	"
8401	6/14/61	18.63	"
8412	6/15/61	25.14	"
8419	6/16/61	12.39	"

4. There exists such a unity of ownership, management and control between Sequoia as shipper and respondent IPCO as a highway permit carrier as to make such arrangement a device by means of which Section 3668 of the Public Utilities Code was violated.

5. Ronald O. Dooms, Bernhard R. Doerksen and Ralph D. Jenner were in fact prime carriers who received less

than the minimum rates established by the Commission in Minimum Rate Tariff No. 2.

6. IPCO should review its records relating to all transportation performed in behalf of Sequoia wherein IPCO employed other carriers to effect such transportation between May 1, 1961, and the effective date of this order, and should pay to such other carriers the difference between the lawful minimum rates and charges applicable to such transportation and the amounts previously paid to such other carriers.

7. Ronald O. Dooms, Bernhard R. Doerksen and Ralph D. Jenner should review their records relating to all transportation wherein they were engaged by IPCO to transport property in behalf of Sequoia between May 1, 1961, and the effective date of this order for the purpose of ascertaining the lawful minimum rates for such transportation, and should take such action, including legal action, as may be necessary to collect the difference between the lawful minimum rates and the amounts they received for such transportation.

8. IPCO's permit should be suspended for a period of five consecutive days, or, in the alternative, it should be required to pay a fine of $2,000.

ORDER

IT IS ORDERED that:

1. IPCO Transportation Company shall cease and desist from permitting Sequoia Forest Industries, Inc., to obtain transportation of property between points in this State at rates less than the minimum rates established by the Commission.

2. If, on or before the twentieth day after the effective date of this order, respondent IPCO Transportation Company has not paid the fine referred to in paragraph 9 of this order, then Radial Highway Common Carrier Permit

No. 54-3795 issued to T. T. Connolly and W. A. Coke, doing business as IPCO Transportation Company, shall be suspended for five consecutive days starting at 12:01 a.m., on the second Monday following the twentieth day after said effective date. Respondent shall not, by leasing the equipment or other facilities used in operations under this permit for the period of suspension, or by any other device, directly or indirectly allow such equipment or facilities to be used to circumvent the suspension.

3. IPCO Transportation Company shall post at its terminal and station facilities used for receiving property from the public for transportation, not less than five days prior to the beginning of the suspension period, a notice to the public stating that its radial highway common carrier permit has been suspended by the Commission for a period of five days. Within five days after such posting respondent shall file with the Commission a copy of such notice, together with an affidavit setting forth the date and place of posting thereof.

4. IPCO Transportation Company shall review its records relating to all transportation performed in behalf of Sequoia Forest Industries, Inc., wherein IPCO employed other carriers to effect such transportation between May 1, 1961, and the effective date of this order, and shall pay to such other carriers the difference between the lawful minimum rates and charges applicable to such transportation and the amount previously paid to such other carriers.

5. Ronald O. Dooms, Bernhard R. Doerksen and Ralph D. Jenner shall review their records relating to all transportation wherein they were engaged by IPCO to transport property in behalf of Sequoia between May 1, 1961, and the effective date of this order for the purpose of ascertaining the lawful minimum rates for such transportation, and shall take such action, including legal action, as

may be necessary to collect the difference between the lawful minimum rates and the amounts they received for such transportation.

6. Within ninety days after the effective date of this order, respondents shall complete the examination of their records required by paragraphs 4 and 5 of this order and shall file with the Commission a report setting forth all undercharges found pursuant to such examination.

7. In the event charges to be collected as provided by paragraph 5 of this order, or any part thereof, remain uncollected one hundred twenty days after the effective date of this order, Ronald O. Dooms, Bernhard R. Doerksen and Ralph D. Jenner shall institute legal proceedings to effect collection and shall submit to the Commission on the first Monday of each month a report of the undercharges remaining to be collected and specifying the action taken to collect such charges and the result of such until such charges have been collected in full or until further order of this Commission.

8. On the effective date of this decision the Secretary of this Commission is directed to cause to be amended Radial Highway Common Carrier Permit No. 54-3795 issued to T. T. Connolly and W. A. Coke, doing business as IPCO Transportation Company, by prohibiting said IPCO whenever it engages other carriers in connection with the transportation of property for Sequoia or of its customers or suppliers, from paying such other carriers less than the applicable minimum rates established by the Commission.

9. As an alternative to the suspension of operating rights imposed by paragraph 2 of this order IPCO Transportation Company may pay a fine of $2,000 to this Commission on or before the twentieth day after the effective date of this order.

The Secretary of the Commission is directed to cause personal service of this order to be made upon T. T. Con-

nolly, W. A. Coke, Sequoia Forest Industries, Inc., Ronald O. Dooms, Bernhard R. Doerksen and Ralph D. Jenner, and this order shall become effective twenty days after the date of such service upon said respondents.

Dated at San Francisco, California, this 5th day of February, 1963.

George G. Grover
President
Everett C. McKeage
Frederick B. Holoboff
Commissioners

Certified as a True Copy, R. J. Pajalich, Secretary, Public Utilities Commission, State of California.

APPENDIX B

Pertinent Statutory Provisions

CALIFORNIA PUBLIC UTILITIES CODE

Division I—Regulation of Public Utilities

Part I — Public Utilities Act

Chapter 9 — Hearings and Judicial Review

Article 3 — Judicial Review

§ 1756. Time for application for review to Supreme Court: Return of writ: Hearing. Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable not later than 30 days after the date of issuance, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown it is continued.

§ 1757. Introduction of new evidence: Limit of review: Finality of findings and conclusions. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions

of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.

§ 1759. Jurisdiction of courts to review orders or decisions of commission. No court of this state, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

§ 1760. When Supreme Court to exercise independent judgment on law and facts. In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.

Division II—Regulation of Related Businesses by the Public Utilities Commission

Chapter 1 — Highway Carriers

Article 6 — Rates

§ 3668. Affording transportation at more or less than established rates by means of false billing, etc., forbidden. No highway permit carrier, or any officer or agent thereof, or any person acting or employed

by it, shall, by means of known false billing, classification, weight, weighing or report of weight, or by any other device, assist, suffer, or permit any corporation or person to obtain transportation for, any property between points within this State at rates less than the minimum rates or more than the maximum rates then established or approved by the commission.

Article 9 — Suspension and Revocation of Permits

§ 3774. Permissible grounds for cancellation, revocation, or suspension of permit: Imposition of fine as alternative. The commission may cancel, revoke, or suspend the operating permit or permits of any highway carrier upon any of the following grounds:

(a) Any illegally conducted highway carrier operations.

(b) The violation of any of the provisions of this chapter, or of any operating permit issued thereunder.

(c) The violation of any order, decision, rule, regulation, direction, demand, or requirement established by the commission pursuant to this chapter.

(d) The conviction of the highway carrier of any misdemeanor under this chapter.

(e) The rendition of a judgment against the highway carrier for any penalty imposed under this chapter.

(f) The failure of a highway carrier to pay any fee imposed upon the carrier within the time required by law.

As an alternative to the cancellation, revocation, or suspension of an operating permit or permits,

the commission may impose upon the holder of such permit or permits a fine of not exceeding five thousand dollars ($5,000). All fines collected shall be deposited at least once each month in the State Treasury to the credit of the General Fund.

[Amended by Stats 1961 ch 1444 § 2.] (Supp. 1961)

Office-Supreme Court, U.S.
FILED
AUG 31 1964
JOHN F. DAVIS, CLERK

No. 288

In the Supreme Court of the United States

OCTOBER TERM, 1964

ALHAMBRA TRUCKING CO., and T. T. CONNOLLY, et al., doing business as IPCO TRANSPORTATION COMPANY,

Appellants,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

Brief for Appellee in Opposition

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August, 1964

BORG PRINTING COMPANY OF CALIFORNIA, 150 FIRST STREET, SAN FRANCISCO 5

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 288

ALHAMBRA TRUCKING CO., and T. T. CONNOLLY, et al., doing business as IPCO TRANSPORTATION COMPANY,

Appellants,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

Brief for Appellee in Opposition

OPINIONS BELOW

The Supreme Court of California denied petitions for writ of review without opinion. The decisions and orders of the California Public Utilities Commission (App. A. of Petition) are reported in 60 Cal. P.U.C. 537 and in 60 Cal. P.U.C. 544.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

The Public Utilities Commission of the State of California (Commission) respectfully submits that, more appropriately stated than in the petition herein, the questions presented are:

1. Is the term "by any other device" contained in Section 3668[1] of the Public Utilities Code of the State of California so vague and uncertain that appellants were denied due process of law, in violation of the Fourteenth Amendment, by the Commission's decisions and orders finding that the contrivances employed by each of the appellants constituted a "device" in violation of that section?

2. Does the denial by the highest court of the State of California of appellants' petitions for writ of review of the decisions of the Commission, without having the record certified to it, without oral argument and without opinion, violate the due process clause of the Fourteenth Amendment?

STATUTES INVOLVED

The pertinent provisions of the Public Utilities Code of the State of California (Sections 3668, 3774, 1756-1757 and 1759-1760) are set out in full in the Petition herein (pp. 28a to 31a of Petition).

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1. Section 3668 of the Public Utilities Code reads as follows: "No highway permit carrier, or any officer, or agent thereof, or any person acting or employed by it, shall, by means of known false billing, classification, weight, weighing or report of weight, or *by any other device*, assist, suffer, or permit any corporation or person to obtain transportation for any property between points within this State at rates less than the minimum rates or more than the maximum rates then established or approved by the commission." (Emphasis added.)

STATEMENT

An explanation of some of the terms used hereinafter is offered to the Court. A "prime" or "overlying" carrier is the one to whom the shipper primarily looks for performance of the contract of transportation. The prime carrier may subcontract the actual hauling to a "subhauler" or "underlying" carrier. The prime carrier must charge and collect from the shipper not less than minimum rates. He may, in turn, pay the subhauler an amount which they agree upon. However, when, as in this case, the shipper and the prime carrier are affiliated, the difference between the minimum rate collected by the prime carrier from the shipper and the amount subsequently paid by the prime carrier to the subhauler inures to the benefit of the shipper or its stockholders. Because of the affiliated relationship, the shipper is, as in this case, able to obtain transportation of its property at less than applicable minimum rates.

Appellants' statement (Petition, pp. 5-12) is factually correct with the exception of the following errors or omissions:

1. The minimum rates established by the Commission (Minimum Rate Tariff No. 2) are not applicable to transportation performed for prime carriers by other "independent-contractor subhaulers," as long as the "independent-contractor subhaulers" are not utilized to obtain transportation for a shipper at less than the applicable minimum rates. However, if there exists such a unity of ownership, interest and control between the shipper and the alleged prime carrier that it can be said that the latter is only an ostensible prime carrier, and that the carrier which actually performs the transportation involved for the shipper-carrier combination is not an "independent-contractor subhauler" but is *in fact* the prime carrier, it is unlawful for

such carrier to charge or collect from the shipper or the ostensible prime carrier any lesser rate than the minimum rate established by the Commission. E.g., pages 1, 2 and 8 of the Appellee's Answer to the Petition for Writ of Review in California Supreme Court.

2. As to Alhambra, the degree of common ownership between the carrier and shipper entities is seventy-nine percent. Two of the three directors of Alhambra's Board of Directors are members of the shipper's six-member Board of Directors. A complete and detailed statement of all of the other facts is contained in the Commission's decisions attached to the Petition herein (pp. 3a to 28a).

3. Section 3774 of the Public Utilities Code of the State of California authorizes the Commission to cancel, revoke or suspend the operating permits of a carrier for any illegally conducted highway operations. The Commission *suspended* appellants' operating permits or, in the alternative, imposed a $2,000 fine. This does not amount to a "forfeiture" as alleged by appellants at pages 7 and 10 of the Petition herein.

4. The word "device" as utilized in Section 3668 of the Public Utilities Code of the State of California is preceded by the words "by any other", and not by the more restrictive word "similar" as indicated on page 7 of appellants' Petition herein.

ARGUMENT

The Commission is a constitutionally created agency, and has been given broad powers to prescribe and enforce minimum rates for the transportation of property upon the highways of the State of California. (Article XII, Sec. 22 of the California Constitution.) The Legislature of this State provided in Section 3668 of the Public Utilities Code that all "devices" permitting or allowing persons or corpo-

rations to obtain transportation of their property at less than the minimum rates shall be condemned. The phrase "by any other device" is a reservoir to encompass all schemes and contrivances which may be invented to permit or allow a person or corporation to obtain transportation of property at less than the minimum rates. Section 3668 forecloses all inventions in the field of evasion of minimum rates.

I. There Has Been No Denial of Substantive Due Process.

At the outset, the Commission takes exception to appellants' assertion that Section 3668 is so vague and indefinite that reasonable men may differ as to its meaning. It is respectfully submitted that the manifest purpose of this section is to strike through all forms of discrimination in rates between shippers and to maintain stability in the minimum rate structure. In *Union Pacific Railroad Co. v. United States*, 313 U.S. 450 (1941) construing a similar provision of the Elkins Act, the Court stated at pages 461-462:

> "With the adoption of prohibition against open rate cutting, various devices were resorted to. . . . Violation of the commerce acts through receipt of advantages is to be tested by actual results not by intention. *Any and all* means to accomplish the prohibited end are banned. . . . In fact favoritism which destroys equality between shippers, however brought about, is not tolerated."[2] (Emphasis added.)

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2. Two sections of the Interstate Commerce Act which contain similar language to that which is contained in Section 3668 of the Public Utilities Code of the State of California read in part as follows:

> 49 U.S.C. Section 6(7). "Transportation without filing and publishing rates forbidden; rebates; privileges. No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and

The words of Justice White, speaking of the Elkins Act, in *New York, New Haven & Hartford Railroad Co. v. Interstate Commerce Commission*, 200 U.S. 361, 392 (1906) are appropriate:

"It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination to this extent and for these purposes the statute was remedial, and is, therefore, entitled to receive that interpretation

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published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or *by any device* any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." (Emphasis added.)

49 U.S.C. Section 10(2). "False billing or classification by carrier; penalty. Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or *by any other device* or means, shall knowingly and wilfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense." (Emphasis added.)

which reasonably accomplishes the great public purpose which it was enacted to subserve. . . . The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer."[3]

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3. In *Southern Railway Co. v. United States and Interstate Commerce Commission*, 186 F. Supp. 29, 36 (N.D. Ala. 1960), aff'd 294 F.2d 850, the court said:

"These statutes, remedial in nature, are 'applicable to every method of dealing by a carrier by which the forbidden result could be brought about.' " Citing *New York, New Haven & Hartford Railroad Co. v. Interstate Commerce Commission*, 200 U.S. 361 (1906).

The court stated in *United States v. Union Pacific Railroad Co.*, 173 F. Supp. 397, 412 (S.D. Iowa 1959), aff'd 362 U.S. 327:

"The purpose of the Interstate Commerce Act and the Elkins Act was to outlaw every subterfuge, plan, scheme, or device formulated by or participated in by any person or corporation to give rebates, concessions, advantages and discriminations to shippers in respect to interstate transportation by carriers subject to the Elkins Act and the statutes were designed to strike down every device without exception no matter how ingenious or labyrinthian, by which these objectives are sought to be accomplished. These statutes are intended to strike through all forms, pretenses, and subterfuges to reach and eradicate the forbidden evil." (citing cases)

In *United States v. Drum*, 368 U.S. 370, 374, 376 (1962) this Court stated that:

"[T]he primary objective of the scheme of economic regulation is to assure that shippers generally will be provided a healthy system of motor carriage to which they may resort to get their goods to market. . . ."

"[T]he problem is one of determining—by reference to the clear but broad remedial purpose of a regulatory statute committed to agency administration—the applicability of a narrow fact situation. . . ."

See also *Armour Packing Co. v. United States*, 209 U.S. 56 (1908) and *United States v. Metropolitan Lumber Co.*, 254 F. 335 (D.C.N.J. 1918).

Section 3668 is likewise a highly remedial statute, and as stated by Justice White, in the *New York* case, 200 U.S. 361, *supra*, "is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve," that being to strike through all pretense, all ingenious devices, to evade the minimum rate structure. (See also, *United States v. Milwaukee Refrigerator Transit Co.*, 142 F. 247 (C.C.E.D. Wis. 1905.) When Section 3668 is read in the light of the legislative purpose for which it was enacted, its meaning is clear and precise. It is submitted that the Commission should not be harnessed with a strict "administrative test" to determine whether, in exercising its broad regulatory powers, a certain arrangement or contrivance constitutes a "device" in violation of Section 3668. Each case must rest on its own facts. The Commission must look to the substance and the results and not be blinded by mere forms of law. (*Chicago, Milwaukee & St. Paul Railway Co. v. Minneapolis Civic & Commerce Association*, 247 U.S. 490 (1918). It is respectfully submitted that the Legislature could not have foreseen all of the ingenious schemes which could be invented to evade the minimum rate structure, and for this reason the Commission should and does have wide latitude in determining whether any given set of circumstances constitutes a "device". In *United States v. Milwaukee Refrigerator Transit Co.*, 145 F. 1007 (C.C.E.D. Wis. 1906), construing a similar provision of the Interstate Commerce Act, the court stated at pages 1012 and 1013:

> "It matters not that the particular practice herein disclosed is not described in the act. The inhibition of 'any device whatever' that accomplishes the condemned results is a ban upon invention in this field."

The administrative test, to the extent that one can say that there is a test, employed by the Commission, is whether the results of the contrivance bring about the forbidden end, i.e. whether the shipper has obtained transportation of its property at less than the prescribed minimum rates. If a shipper has acquired an unfair economic advantage by the utilization of an ingenious contrivance or device over other shippers similarly situated, the Commission has consistently held that such a contrivance violates Section 3668.[4] It is submitted that by reading Section 3668 in the light of the obvious legislative intent, reasonable men could not differ as to the meaning of this section and of the word "device" contained therein.

The Commission correctly found upon the undisputed facts (see IPCO Pet. for Writ of Review and Alhambra Pet. for Writ of Review in the California Supreme Court) and after considering the ultimate result of the combination thereof, that "there exists such a unity of ownership, interest and control" between the shipper and the alleged prime carrier as to make such an intercorporate arrangement a "device" in violation of Section 3668.[5]

The intent of Section 3668 of the Public Utilities Code is plain and precise, and that which is condemned therein can be reasonably inferred therefrom. The statute is not so vague and indefinite that reasonable men may differ as to its meaning, but rather the statute condemns a result.

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4. *J & V Trucking Co.*, Case No. 6567 (Dec. No. 63227) 59 Cal. P.U.C. 337; *Direct Delivery System*, Application No. 35927 (Dec. No. 51619) 54 Cal. P.U.C. 258; *Trinity Trucking & Lumber Co.*, Case No. 5893 (Dec. No. 55476) 57 Cal. P.U.C. 698; *Soule Transportation, Inc.*, Case No. 7105 (Dec. No. 63103) 59 Cal. P.U.C. 260; Pet. for writ of Review den., S. Ct. No. S.F. 21024. *Southern California Lumber Transport*, Case No. 6016 (Dec. No. 57341) 56 Cal. P.U.C. 553 (Certiorari den., S.F. No. 20076).

5. See pages 9a and 23a of Petition herein.

and any arrangement, contrivance or device which is invented to achieve the forbidden result is condemned. Such a statute does not collide with the due process clause of the Fourteenth Amendment. Thus, there is no federal question requiring settlement by this Court.

II. There Has Been No Denial of Procedural Due Process.

At the outset the Commission takes exception with appellants' assertion that the Commission's procedures do not provide for an alleged "minimal safeguard of preliminary findings by an impartial hearing examiner." (Pet., p. 19.) The Rules of Procedure of the Commission make provision for the filing of a petition for a proposed examiner's report (Rules 69-71). However, appellants failed to avail themselves of this procedure.

The Legislature of the State of California has made provision in Section 1756 for judicial review of Commission decisions. This section provides that a complaining party may "apply" to the Supreme Court for a writ of review,[6] and that if the writ is issued, the record shall be certified to it. The Commission respectfully submits that an aggrieved party has the *opportunity* for judicial review of Commission decisions under the existing appellate procedures of this State. The petition for writ of review and the answer thereto put the court in full and complete possession of all the facts.[7] In the cases herein involved, the Supreme

6. The writ of certiorari may be labeled a writ of review (California Code of Civil Procedure § 1067).

7. Wheat, Practice and Procedure before the Railroad Commission, 15 Cal. L.Rev. 445, 477, 480, (1927).

> "That court considers the petition and any answer thereto which the Commission may file, and either grants or denies such writ. . . ."
>
> . . . . . .
>
> "Thus the essential issues are raised and brought squarely

Court denied appellants' petitions without opinion. (See pp. 1a, 15a of Petition herein.)

The question of the constitutionality of this procedure was before this Court in the case of *Napa Valley Electric Co. v. Railroad Commission of the State of California*; 251 U.S. 366 (1920). It is stated at page 372:

> "[T]he applications for writs of certiorari were denied, which was tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority or violate any right of the several petitioners under the Constitution of the United States or of the state of California. . . . And further, to quote the district court, 'Such a determination is as effectual as an estoppel as would have been a formal judgment upon issues of fact'. (Citing cases.) . . . The court held, that absence of an opinion by the supreme court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented, and its subsequent conclusive effect upon the rights of the Electric Company."[8]

The lower court in the same case held that:

> "Nor is it material that the reasons for the conclusion reached by the court are not given. We are not concerned with the reasoning, but only with the judgment, and it must be assumed in support of the latter that upon the facts presented to it the state court upon due consideration reached the conclusion that plaintiff's rights had not been violated." (*Napa Valley Elec-*

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to the attention of the court within ten days after the initiation of the proceeding before that tribunal. Since the denial of a writ of review has been held to be a final determination upon the matters involved (*Napa Valley* case) this would seem to be the quickest possible method of obtaining a final judicial decision upon a disputed point of law."

8. To the same effect, see *Southern Pacific Co. v. Van Hooscar*, 72 F. 2d 903 (9th Cir. 1934).

tric Co. v. Railroad Commission of California, 257 F. 197 (N.D. Cal. 1919), aff'd 251 U.S. 366 (1920).

In *Lehigh Valley Railroad Co. v. Board of Public Utility Commissioners*, 278 U.S. 24 (1928), this Court expressly rejected the "Ben Avon"[9] doctrine under the circumstances therein involved. It is submitted that the "Ben Avon" doctrine has no application to the cases here under review.[10]

Appellants would have the California Supreme Court examine the record and reweigh the evidence in every matter that may come before that court on a petition for writ of review. It is respectfully submitted that this would place an undue burden on that court.

> "It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action." *Gray v. Powell*, 314 U.S. 402 (1941).

Denial of a petition for a writ of review, the granting of which is discretionary with the court, does not infringe upon the constitutional rights of the appellants for judicial review. (*Lehigh Valley R.R. Co. v. Public Utility Commissioners*, 278 U.S. 24 (1928), affirming *Napa Valley* case, *supra*.

The California Supreme Court has consistently followed the *Napa Valley* case, *supra*, and recognizes that a complaining utility has a right to a review and determination of whether the Commission regularly pursued its authority and whether the order or decision violates any right of the petitioner. In passing on these questions, the court must

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9. *Ohio Valley Water Co. v. Ben Avon*, 253 U.S. 287 (1920).

10. See also McGarney, Administrative Decision and Court Review thereof, in California, 29 Cal. L. Rev. 110 pp. 135-144 (1940).

pass on the merits thereof as of law and fact. As is stated in *Southern California Edison v. Railroad Commission of the State of California*, 6 Cal. 2d 737, 747, 756, 59 P.2d 808 (1936),

> "In thus disposing of them the court acted judicially and the determination thereof was on the merits even though the order of the court be a denial of an application for review. Such an order of this court fully complies with federal constitutional requirements as interpreted by the Supreme Court of the United States. . . . The denial of the petition for a writ of review in each case must be deemed a determination of the point against petitioner's contention." (Citing *Napa Valley Electric Co. v. Railroad Commission*, 251 U.S. 366 (1920)).
>
> See also *People v. Western Airlines, Inc.*, 42 C.2d 621 (1954).

In *Consolidated Freightways, Inc. v. Railroad Commission of California*, 36 F. Supp. 269 (N.D. Cal. 1941), the court stated that:

> "The law in California is that the State Supreme Court, in reviewing an order of the Railroad Commission, acts solely in a judicial capacity. [Citing cases.] Thus, a judicial decision was rendered . . . ."
>
> See also *Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470 (1930)

It is submitted that the cases of *Ben Avon*,[11] *St. Joseph Stock Yards*,[12] and *Crowell v. Benson*,[13] can be distinguished from the proceedings here under review. In these cases,

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11. *Ohio Valley Water Co. v. Ben Avon*, 253 U.S. 287 (1920), *supra*.

12. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, (1936).

13. *Crowell v. Benson*, 285 U.S. 22 (1932).

the administrative agency was performing the legislative function of rate making, and the constitutional question was whether there was confiscation. This distinction is recognized by this Court in the *St. Joseph Stock Yard* case, *supra*, at page 52:

> "This is the purport of the decisions above cited with respect to the exercise of an independent judicial judgment upon the facts where confiscation is alleged."

Mr. Justice Brandeis' concurring opinion in the *St. Joseph* case, *supra*, is most enlightening. In reviewing the cases he states that,

> "[D]ue process does not require that a decision made by an appropriate tribunal shall be reviewable by another. [Citing cases] They tell us that due process is not necessarily judicial process."[14]

Appellants make no contention that due process was denied them in that they failed to have notice of hearing, a fair and impartial hearing, or opportunity to present evidence. Their sole contention is that they were denied judicial review in violation of the due process clause of the Fourteenth Amendment. Appellants had the opportunity for judicial review (Section 1756 of the Public Utilities Code), they exercised this opportunity, and the Supreme Court, after considering the petition for writ of review and the answer thereto, denied the petition. The denial of the petition for writ of review constituted a judicial judgment by the highest court of the State of California. Thus, the Appellants were not denied due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. Therefore, there is no federal question requiring settlement by this Court.

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14. *St. Joseph Stock Yards Co. v. U.S.*, 298 U.S. 38, 77, *supra*.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for an appeal (or petition for writ of certiorari) should be denied.

Respectfully submitted,

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August, 1964.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 288

ALHAMBRA TRUCKING CO., and T. T. CONNOLLY, ET AL., doing business as IPCO TRANSPORTATION COMPANY,
Appellants

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California

REPLY TO MOTION BY CALIFORNIA PUBLIC UTILITIES COMMISSION TO DISMISS APPEAL

PRELIMINARY STATEMENT

The California Public Utilities Commission's "Brief in Opposition" to Appellants' Jurisdictional Statement confirms rather than refutes Appellants' basic Constitutional position that the retroactive and punitive application of a vague regulatory statute by an administrative agency, *without judicial review*, presents substantial questions of substantive and procedural due process which warrant plenary review by this Court.

Conceding that Appellants' Constitutional contentions were properly presented yet rejected in the California Supreme Court (PUC Br. 3, 13), the PUC would now justify its punitive application of

California Public Utilities Code Section 3668 by reference to federal cases (PUC Br. 5-8) never discussed or even cited in its decisions (Juris. St. 3a-12a, 17a-27a). But irrespective of the invalidity of such a belated effort to shore up a defective decision,[1] these federal cases only dramatize the fatal absence of procedural safeguards where the California PUC admittedly has "wide latitude" to impose penal sanctions so that "each case must turn on its own facts" evaluated under standards so vague that the agency itself doubts even today whether "one can say that there is a test". (PUC Br. 8-9). For in each of the ICC cases the PUC now cites, a federal *court*, either on review or in an original action, *did* consider the facts of record in light of the pertinent statutory text, legislative history, and judicial precedents, and *did* render its judgment in a fully articulated decision —even where only a prospective order rather than retroactive punishment was the sanction involved.[2]

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[1] Cf. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943) (validity of administrative order adjudged only on grounds "upon which the record discloses that its action was based.")

[2] *Union Pacific R. Co.* v. *United States*, 313 U.S. 450 (1941) (appeal from district court injunction proceeding); *New York, New Haven & Hartford R. Co.* v. *ICC*, 200 U.S. 361 (1906) (same); *Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908) (appeal from criminal conviction); *United States* v. *Union Pacific R. Co.*, 173 F. Supp. 397 (S. D. Iowa 1959) aff'd 362 U.S. 327 (1960) (civil injunction suit); *Southern Ry. Co.* v. *United States*, 186 F. Supp. 29 (N.D. Ala. 1960) (suit to enjoin or set aside ICC cease and desist order); *United States* v. *Metropolitan Lumber Co.*, 254 Fed. 335 (D. N.J. 1918) (demurrer to indictment); *United States* v. *Milwaukee Refrigerator Transit Co.*, 142 Fed. 247 (E.D. Wis. 1905) (demurrer in injunction proceeding); *United States* v. *Milwaukee Refrigerator Transit Co.*, 145 Fed. 1007 (E.D. Wis. 1906) (dismissing injunction proceeding as to shipper who paid full rates, even though intermediary transit company controlled by shipper's major stockholders received illegal rebates).

Particularly in light of the striking discrepancy between California's summary post-card "review" procedures and the genuine judicial review accorded by the federal and most state courts,[3] the PUC's punitive application of California Public Utilities Code § 3668, based on unarticulated *ad hoc* determinations, clearly raises serious questions of *substantive* due process.

And the PUC's obvious confusion (PUC Br. 10-14) as to the Constitutional minimum extent of judicial review required to satisfy *procedural* due process confirms the need for an authoritative statement by this Court at this time.

I. The Public Utilities Commission's Arguments Confirm the Unconstitutional Vagueness of California Public Utilities Code § 3668 as Applied in These Cases.

As these Appellants pointed out in their Jurisdictional Statement (pp. 6-10, 14-15, 17-18), *without contradiction by the PUC*, the instant cases arise out of the PUC's retroactive use of its unique administrative power to impose fines and penalties against two small truckers—on the basis of a limited degree of common ownership between each of them and one of their shippers, long known to the Commission, and only years later questioned as a "device" through which the shippers allegedly obtained transportation at less than tariff rates.

As the PUC cannot deny, a statute imposing penalties must be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties," e.g, *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). Yet the PUC brief (pp. 4-10) does not deign to discuss or distinguish any of the numerous authorities cited by Appellants in which *this Court* has invalidated punitive

[3] See cases cited in Jurisdictional Statement, pp. 21-22, nn. 9-10.

state business regulatory statutes as unconstitutionally vague (Juris. St. 14 n. 4). Even now the PUC has totally failed to articulate any meaningful standard governing its imposition of penalties in cases under California Public Utilities Code § 3668.

Significantly, the PUC cites no decisions by a California *court* construing or giving content to the vague generalities of § 3668. And, although the PUC now purports to rely on "the obvious legislative intent" claimed to permeate the statute, its brief cites no California legislative history which might shed some light on the statute's meaning.

Instead, the PUC asserts for the first time (PUC Br. 5-9) that its interpretation of Section 3668 followed federal cases decided under the Elkins Act, 49 U.S.C. § 41, which somehow imported a "plain and precise" meaning into the California statute, despite the total absence of any state judicial construction.

Actually, most of the federal cases belatedly cited by the PUC did not involve shipper-carrier affiliations *at all*, and *none* adjudged a shipper's mere ownership interest in a carrier to be a forbidden "device" so long as the shipper, as here, paid the full tariff rate. And cf. *United States* v. *South Buffalo Ry. Co.*, 333 U.S. 771, 785 (1948) (holding company's 100% ownership of carrier and its major shipper permitted under "commodities clause," 49 U.S.C. § 1(8), where subsidiary's separate identity "preserved in form and substance").[4]

[4] Also, nothing in the federal cases suggests that even the shipper's actual receipt of an affiliated carrier's profits, for example through dividends or other normal incidents of ownership, would constitute a "device." By contrast, the California PUC has held that any increase in the carrier's income automatically "inures to the benefit" of the shipper even where, as here, there are *no* "dividends, distributions of capital" or other payments to the shipper (Juris. St. 7a, 21a).

The Elkins Act cases cited by the PUC, moreover, were all *judicial* proceedings in which the federal courts, on judicial review or in original actions, *did* carefully analyze the facts before them in light of statutory language, legislative history, and previous judicial precedents, before adjudging, in carefully articulated opinions, whether or not a violation had occurred.[5] Thus, even apart from the remoteness of these cases to the facts at bar, and the lack of any warning in any PUC pronouncement that carriers must follow the federal courts' standards on pain of administrative penalties *in California*, none of the federal precedents even suggest that any agency, let alone a state commission, has "wide latitude" (PUC Br. 8) to impose penal sanctions in the absence of discernible criteria or principles.

The painstaking approach of the federal courts in these Elkins Act proceedings stands in sharp contrast to the California PUC's arbitrary fiat here. The PUC's mechanical citation of its own inapposite *Soule* decision in the instant cases (Juris. St. 7a, 21a) does not even reveal "the discerning line for decision of the basic issue in the case," *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 657 (1964), let alone provide a meaningful standard for those carriers who wish to avoid punitive agency action in the future.[6]

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[5] See note 2 *supra*.

[6] As the PUC does not deny, the instant cases present widely differing fact situations. Appellant Alhambra, for example, used subhaulers on less than 8% of its $100,000 a year business which was primarily carried by its own trucks and drivers, negating any intent "to circumvent § 3668 and evade minimum rates illegally," as dissenting Commissioner Mitchell pointed out (Juris. St. 14a). Appellant IPCO, on the other hand, is a limited partnership, only 24% owned by three individuals who own less than 50% of the stock of a shipper (Juris. St. 6). Yet the PUC imposed identical fines on each Appellant on the basis of virtually identical boiler-

Actually, the PUC *even now* disclaims *any* standard in its application of § 3668. Arguing that it "should not be harnessed with a strict administrative test" (PUC Br. 8), its brief sets forth at least three different and conflicting interpretations of the statute:

(1) Thus, it first suggests (PUC Br. 3) that whenever "the shipper and the prime carrier are affiliated" in any way, any lower rates charged the prime carrier by a subhauler "inure to the benefit" of the shipper, and thus violate § 3668—a *per se* test which flouts the legislative decision not to outlaw shipper-carrier affiliations (Juris. St. 18, 13a-14a).

(2) Alternatively, the PUC contends (PUC Br. 3) that the statute is violated only "if there exists such a unity of ownership interest and control between the shipper and the alleged prime carrier that it can be said that the latter is only an ostensible prime carrier" —a test which implies a thorough factual analysis totally absent in the decisions under review.

(3) Finally, the PUC asserts (PUC Br. 9) that "*to the extent that one can say that there is a test*", it is simply "whether the shipper has obtained transportation of its property at less than the prescribed minimum rates"—a tautological and hence useless restatement of the statute itself.

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plate opinions, each of which recited only that "the facts here are sufficiently similar to the facts" of its *Soule* decision "to warrant reaching the same result" (Juris. St. 7a, 21a). Yet, as the PUC's silence on brief confirms, the *Soule* case concerned "a 'carrier' which owned *no* equipment and was a *100% subsidiary* of its only shipper" (Juris. St. 8). Thus the finding that subhaulers' lower rates "inured to the benefit" of the shipper, while appropriate in *Soule*, provides no guidelines as to what *other* shipper-carrier relationships may be singled out for punitive sanctions in the future.

Whatever deference may be due the expertise of those administrative agencies whose fully articulated opinions inform and guide those subject to regulation, cf. *United States* v. *Drum*, 368 U.S. 370, 384 (1962), is clearly not due where an agency cannot explain its reasoning in its decision or even in its briefs before this Court. And, where these unfathomable standards carry harsh and punitive sanctions imposed by fiat, important substantive due process questions inevitably arise.

II. The PUC's Brief Underscores the Need for a Clear Pronouncement By This Court Defining the Extent to Which Procedural Due Process Requires Judicial Review of Punitive State Agency Action.

Aggravating the PUC's failure to articulate any meaningful standards governing its punitive applications of § 3668 is the absence of any California judicial precedent construing that provision. For unlike the federal courts, which have a "duty to canvass the whole record of the proceeding before the [Interstate Commerce] Commission", *Southern R. Co.* v. *United States*, 186 F. Supp. 29, 33 (N.D. Ala. 1960), the California Supreme Court has refused to provide any review procedure capable of guidance or check on the California PUC's actions in this type of case.

Notwithstanding the PUC's misreading of the precedents (PUC Br. 11-13), *no federal court* has *ever* held that the California Supreme Court's summary denials of review suffice to provide the minimal Constitutional requirements of procedural due process to a party subjected to punitive sanctions on the basis of vague administrative interpretations. Indeed, *Napa Valley*

and its kindred cases,[7] which hold only that the California Supreme Court's denial of review is *res judicata* as to all issues subsumed in the PUC's decision, underscore the absence of meaningful judicial review by the *only* California judicial tribunal empowered to review the PUC's proceedings.[8]

Far from establishing that judicial review of punitive state agency actions is *not* required, the PUC's brief (pp. 10-14) highlights the confusion among judges, scholars, and practitioners alike (see Juris. St. 21-24), which cries out for an authoritative definition by this Court of the extent to which procedural due process requires some form of meaningful judicial review of state administrative sanctions.[9]

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[7] *Napa Valley Electric Co.* v. *Railroad Commission of State of California*, 251 U.S. 366 (1920); *Southern Pacific Co.* v. *Van Hoosear*, 72 F. 2d 903 (9th Cir. 1934); *Consolidated Freightways, Inc.* v. *Railroad Commission of California*, 36 F. Supp. 269 (N. D. Cal. 1941). Actually, despite the mandatory direction of the governing statute (California Public Utilities Code § 1756) that the writ of review "*shall* be made returnable" within 30 days and "*shall* direct the Commission to certify its record in the case to the court" whereupon "the cause *shall* be heard," the California Supreme Court has felt free to deny review without benefit of *either* the record *or* a hearing.

[8] This case thus differs from *Lehigh Valley R. R. Co.* v. *Public Utility Commissioners*, 278 U.S. 24, 40-41 (1928), where this court upheld New Jersey's certiorari procedure for review of PUC regulatory actions on the assumption that the state court of equity would be available if this procedure proved inadequate to protect federal Constitutional rights. Under California Public Utilities Code § 1759, however, *no* California Court except the Supreme Court may "review, reverse, correct, or annul" the California PUC's decisions.

[9] The PUC's suggestion (PUC Br. 13-14) that judicial review is essential only in so-called "legislative" rate-making cases obviously rests on a misreading of *Crowell* v. *Benson*, 285 U.S. 22 (1932), a longshoremen's compensation case where judicial review was held

Finally, it is absurd to suggest that meaningful review would require the California courts to become "fact-finding bodies" (PUC Br. 12). Compare *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488-490 (1951) (reviewing court must keep agency "within reasonable grounds" based on "substantial evidence" in light of "all that the record relevantly presents"); 4 DAVIS, ADMINISTRATIVE LAW TREATISE, § 28.19, p. 102 (1958) (advocating "substantial evidence" review in lieu of "independent judicial determinations of questions of fact").

Above all, the PUC's brief shows no discernment of the procedural significance of its novel *administrative* power to impose retroactive penal sanctions. For if *any* jural distinction exists between rate-making cases, where the PUC apparently concedes (PUC Br. 13-14) that a Constitutional right to judicial review exists notwithstanding their complex records requiring utmost agency expertise, and the instant punitive actions where conventional legal principles rule, surely the latter require *more* rather than *less* meaningful judicial review. See Bell, *Utility Appeals, Review or Rubberstamp*, ABA Public Utility Law Sec. Rep. 37 (1963); cf. *Winters* v. *New York*, 333 U.S. 507, 515

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essential to due process. Its further reliance (PUC Br. 14) on Justice Brandeis' "enlightening" assertion that "due process is not necessarily judicial process" is unilluminating on its face, and ignores Justice Brandeis' further statement that "when dealing with constitutional rights" there must be "an opportunity of presenting in an appropriate proceeding, at some time to some court, every question of law raised." *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 77 (1936) (concurring opinion). Moreover, in five of the six cases cited to support Brandeis' suggestion that judicial review may not always be constitutionally required, some form of judicial review or other judicial determination *was in fact available*, and in the sixth no prejudicial error by the administrative body was alleged.

(1947) (requiring higher standard of clarity in penal statutes).

CONCLUSION

Nothing in the PUC's brief has dispelled the substantial federal questions arising from the decisions below which warrant plenary resolution by this Court. On the contrary, the PUC's insistence on "wide latitude" to impose penal sanctions without effective judicial review (PUC Br. 8) confirms the need for an authoritative pronouncement defining the extent to which the Constitution permits such unchecked action by a state commission. Compare Jaffe, *The Right to Judicial Review Parts I, II*, 71 Harv. Law Rev. 401, 769, 808 (1958); 4 DAVIS, ADMINISTRATIVE LAW TREATISE, § 28.21, pp. 112-113 (1958).

Appellants respectfully urge, therefore, that the Court permit this case to be heard on the merits.

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